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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1996

JANICE FAY FAIRCLOTH, EVELYN D. FREDERICK,
CALLWEALL W. SMILING,

Petitioners,

v.

THE LUNDY PACKING COMPANY,
ANNABELLE L. FETTERMAN, MABEL F. HELD,
TRUSTEES LUNDY PACKING COMPANY
STOCK OWNERSHIP PLAN, AND JOHN DOES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, contrary to the holdings of the Sixth Circuit and Ninth Circuit in banc, the Fourth Circuit correctly held that the documents required to be provided to employee benefit plan participants under Sections 104(b)(4) and 404(a)(1)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA") exclude basic plan documents necessary to determine the value of their benefit, their tax liability, and whether their plan is being administered in accordance with the bonding requirements of ERISA.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Janice Fay Faircloth, Evelyn D. Frederick, and Callweall W. Smiling, as participants in Lundy Packing Company Employee Stock Ownership Plan ("Plan"), and the Respondents, The Lundy Packing Company as Plan administrator and the named fiduciary of the Plan, and Annabelle L. Fetterman and Mabel F. Held as Plan Trustees and fiduciaries and John Does.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 91 F. 3d 648. The opinions and judgement of the District Court for the Eastern District of North Carolina are unreported. All of the opinions, including the appellate court's unreported denial of Petitioners' suggestion for rehearing in banc, are reproduced in the Appendix.

JURISDICTION

The opinion of the Court of Appeals was entered on August 2, 1996. This petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 104(b)(4) and 404(a)(1)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001, et seq., are the primary statutory provisions at issue in this case. Section 104 (b)(4) provides:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

Section 404 (a)(1)(A) provides:

> Subject to section 403(c) and (d), 4042 and 4044 [concerning plan terminations] a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

(A) for the exclusive purpose of:

(i) providing benefits to participants; and beneficiaries; and

(ii) defraying reasonable expenses of administering the plan.

The following ERISA provisions also are pertinent to this matter.

ERISA Section 3(3), 29 U.S.C. § 1002(3)

ERISA Section 3(16), 29 U.S.C. § 1002(16)

ERISA Section 3(21), 29 U.S.C. § 1002(21)

ERISA Section 104(b)(4), 29 U.S.C. §1024(b)(4)

ERISA Section 402(a), 29 U.S.C. § 1102(a)

ERISA Section 412(a), 29 U.S.C. §1112(a)

ERISA Section 502(c)(1), 29 U.S.C. §1132(c)(1).

ERISA Section 502(e)(1), 29 U.S.C. §1132(e)(1).

The full text of these provisions appears in the Appendix hereto.

STATEMENT OF THE CASE

1. The Factual Background

Petitioners Janice Fay Faircloth and Evelyn D. Frederick are employees of the Lundy Packing Company ("Lundy"). Petitioner Callwell W. Smiling is a former employee of Lundy. All of the Petitioners are participants in the Lundy Packing Company Stock Ownership Plan ("Plan" or "ESOP"). The ESOP is an employee benefit plan within the meaning of ERISA Section 3(3). Appellee Lundy, is the "plan administrator" within the meaning of ERISA Section 3(16), and

the "named fiduciary" within the meaning of ERISA Section 402(a). Respondents Annabelle L. Fetterman and Mabel F. Held are employees of Lundy and Trustees of the Plan. They are also fiduciaries of the Plan within the meaning of ERISA Section 3(21).

Petitioners Faircloth, Frederick and Smiling received statements from Lundy indicating that the value of their benefits under the Plan had dropped by 42% from June 29, 1991 to July 4, 1992. Petitioners were informed that the reason for the precipitous decline in the value of their account was because Respondents had valued Lundy stock at only 58 percent of the value assigned to it in the prior Plan year. Virtually all of the assets of the Plan are invested in Lundy stock.

Concerned for the safety of their retirement income, Faircloth, Frederick and Smiling requested in writing on March 23, 1993 that the Lundy plan administrator provide them with a number of documents regarding the Plan. The requested documents included the bond covering the Plan or its fiduciaries required by ERISA Section 412 and the last Internal Revenue Service determination of tax qualification for the Plan. Among the other documents requested, were contracts between the Plan and its asset custodians and investment managers. The letters further requested that Respondents provide all of the requested documents within 30 days as required by ERISA Section 502(c)(1). By letter dated April 19, 1993, Respondents refused to provide the requested documents.

In an effort to discover whether Lundy had accurately valued their accounts, Petitioners requested by letter dated May 25, 1993 that the plan administrator provide them with a copy of the stock appraisal used to value the stock owned by the Plan so that they might learn the basis by which the value of their benefits were measured. Petitioners also requested copies of

financial documents upon which the stock appraisal was based. These were also refused.

2. The Proceedings Below

a. The Complaint

Petitioners filed their complaint on May 27, 1993 seeking to enforce Respondents' disclosure obligation when Respondents did not provide the documents requested on March 23, 1993. The complaint was filed pursuant to ERISA Section 502(e)(1) which provides that the district courts of the United States have exclusive jurisdiction over civil actions by plan participants or beneficiaries under Title 1 of ERISA. The complaint, *inter alia,* seeks disclosure under ERISA Section 104(b)(4) of all of the documents that Petitioners requested. The complaint also alleges that failure to provide the requested documents constitutes a breach of Respondents' fiduciary duty under ERISA Section 404(a)(1)(A) to discharge their duties solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries.[1]

When Lundy notified Petitioners by letters dated June 18, 1993 that it refused to furnish the documents requested in Petitioners' May 25, 1993 letter, Petitioners filed an Amended Complaint on July 21, 1993, adding a count demanding the documents requested in their second information request.

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[1] In addition, the complaint alleges that Respondents violated ERISA Section 404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D), which requires that plan fiduciaries discharge their duties in accordance with the documents and instruments governing the plan. The basis for the allegation is that Respondents' failure to provide documents violated the terms of the Plan's Summary Plan Description. Petitioners are not seeking review of the Fourth Circuit rulings on these claims.

b. The Order of the District Court

The parties filed cross-motions for summary judgment below. The District Court ruled on Respondents' motion on October 12, 1994. In that Order, the District Court interpreted the "catch all" phrase in ERISA Section 104(b)(4) requiring the disclosure to participants of "other instruments under which the plan is established or operated." The Court concluded that the provision in question required disclosure of all "documents identified by the statute, and which in a legally operative manner, either establish or provide direction for the operation of the plan." According to the District Court, the bond policy, IRS determination letter, and the appraisal reports and supporting financial documents therefore were outside the scope of disclosure required by Section 104(b)(4). The District Court concluded that ERISA Section 404(a)(1)(A) did not require disclosure of these documents either. By order dated January 20, 1995, the District Court ruled on Petitioners' Motion for Summary Judgment, concluding that the fiduciary insurance policy and contracts between the Plan, the custodian of assets, and the investment manager are documents that must be furnished under ERISA Section 104(b)(4).

c. The Decision of the Fourth Circuit

The Fourth Circuit (Michael, J. concurring in part, dissenting in part) affirmed in part and reversed in part, the judgment of the District Court. The majority declined to adopt the District Court's definition of the scope of disclosure required under Section 104(b)(4). It also determined not to adopt the definition of the scope of disclosure under Section 104(b)(4) that was annunciated by the Sixth Circuit in *Bartling v. Fruehauf Corp.*, 29 F.3d 1062 (6th Cir. 1994) or the Ninth Circuit sitting in banc, in *Hughes Salaried Retirees Action Committee v. Administrator of Hughes Non-Bargaining Retirement Plan*, 72 F.3d 686 (9th Cir. 1995), *cert. denied*,__

U.S._, 116 S. Ct. 1676, 134 L.Ed. 2d 779 (1996) Appendix at 7a-10a. The majority instead created it own standard, which limited the scope of disclosure under the provision to "formal or legal documents under which the plan is set up or managed." Appendix at 7a. It then, purporting to apply this standard, affirmed the District Court's holding that disclosure under Section 104(b)(4) did not encompass such formal and legal documents as the stock appraisal report and supporting financial information, the Plan's Internal Revenue Service determination letter, and the bonding insurance policy protecting the Plan against the dishonesty of Plan fiduciaries. Appendix at 11a.

The Fourth Circuit held that disclosure of plan information required by Section 404(a)(1)(A) was, at best, coextensive with that required by Section 104(b)(4). Thus, it concluded that Respondents were not under a fiduciary obligation to disclose this information about the Plan to Petitioners. Appendix at 14a-19a.

In tandem with its refusal to give Petitioners access to the basic Plan documents described above, the panel reversed the District Court's holding that the funding and investment policies need not be produced. Appendix at 14a.

In a well-reasoned dissent,[2] Judge Michael disagreed with the majority's conclusion that the ESOP stock appraisal, the supporting financial information on which that appraisal was based, the Internal Revenue Service determination letter, and the bond required to be maintained under ERISA Section 412(a) all were outside the scope of disclosure required by Section 104(b)(4). Appendix at 23a. Judge Michael concluded

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[2]Judge Michael concurred with the majority's conclusion that ERISA Section 404(a)(1)(A) did not extend the disclosure obligation beyond that required under ERISA Section 104(b)(4).

that the IRS determination letter was an instrument under which the Plan was operated since it establishes whether the Plan has to pay taxes on its earnings, whether contributions to the Plan are tax deductible by Lundy, and whether employees are taxed currently on the contributions made by Lundy on their behalf. Appendix at 32a-33a. Judge Michael also expressed the view that the fiduciary bond must be disclosed because fiduciaries must be bonded under ERISA Section 412(a) and "the Plan cannot operate without fiduciaries." *Id.*

Addressing the question of whether the ESOP stock appraisal and supporting financial information must be disclosed, Judge Michael expressed his view that ERISA mandated disclosure of all information necessary for ESOP participants to determine whether the sponsoring employer is buying stock and selling stock at a fair price in transactions with the ESOP. Appendix at 31a. He recognized that it is in a sponsoring employer's interest to buy shares from the ESOP "cheap" and sell them to the ESOP "dear" and that such manipulation of the stock price endangers the retirement benefits of the ESOP participants and beneficiaries. *Id.* Under such circumstances, he stated, disclosure of information necessary to verify the accurate valuation of the stock is required under Section 104(b)(4) in order to enable participants to protect their benefits against wasting by the employer through abuse of the appraisal process: "[w]hen the same people manage both the ESOP and the sponsoring company, as in this case, employees need to know that share prices have not been manipulated for the benefit of the sponsor" and to the detriment of the ESOP participants and beneficiaries. *Id.* Judge Michael opined that, because an accurate valuation of the shares is "absolutely critical to the Plan's operation," the appraisal and supporting financial information is clearly an

"instrument" under which the Plan is "operated." Appendix at 32a.[3]

REASONS FOR GRANTING THE WRIT

Petitioners seek a writ of certiorari to the court below because of the great importance of this case to ERISA employee benefit plans of all types, their participants, sponsors, administrators and trustees. It is essential that participants, sponsors, administrators, and trustees know clearly the extent of their obligations under Sections 104(b)(4) and 404(a)(1)(A) of ERISA to disclose plan information. Before the Fourth Circuit issued its opinion in this matter, the Circuit Courts of Appeal applied two different statutory interpretations in determining what documents must be provided by plan administrators upon request by participants. Now, there are three. Consequently, plan administrators and plan sponsors are operating under unknown rules that may vary depending on where their offices or participants are located. If they refuse to provide documents in response to a participant request they run the risk of penalties of $100 a day under ERISA Section 502(c)(1). The current morass is directly inconsistent with ERISA's goal of national uniformity. *See Ingersoll Rand Co. v. McClendon,* 498 U.S. 133, 142, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990). Participants in the Fourth Circuit now find themselves entitled to less information than that available to participants residing in the Sixth and Ninth Circuits even though they may be participants in the very same plan.

If the Fourth Circuit decision stands, participants in that Circuit will be unable to obtain the information that they need to determine whether they are receiving the retirement benefits they earned. Moreover, they will be unable to determine if

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[3]On August 30, 1996, the Fourth Circuit denied the Petitioners' suggestion for rehearing in banc. Appendix at 37a.

their plan is adequately protected against the dishonesty of those who handle its assets or whether they are actually entitled to defer taxes on their retirement benefits.

A. The Fourth Circuit's Holding Below Directly Conflicts with Decisions of the Sixth and Ninth Circuits

As the Fourth Circuit majority itself concedes, its narrow construction of ERISA Section 104(b)(4) is in direct conflict with the holding of the Sixth Circuit in *Bartling v. Fruehauf Corp.*, 29 F.3d 1062 (6th Cir. 1994). Moreover, It conflicts with the in banc Ninth Circuit's decision in *Hughes Salaried Retirees Action Committee v. Administrator of Hughes Non-Bargaining Retirement Plan*, 72 F.3d 686 (9th Cir. 1995), *cert. denied.* _U.S._, 116 S.Ct. 1676, 134 L. Ed. 2d 779(1996).

In *Bartling*, the Sixth Circuit held "that, all other things being equal, courts should favor disclosure where it would help participants understand their rights." *Bartling*, 29 F.3d at 1070. Applying this principle, the Sixth Circuit concluded that a plan administrator is required under ERISA Section 104(b)(4) to furnish participants with a plan's actuarial valuation report and a written calculation procedure showing how a participant's benefits are calculated under a plan. Because the preparation of an actuarial report is required by ERISA, the court reasoned, such reports are "indispensable to the operation of the plan" and "as such are instruments under which the plan is . . . operated." *Id.*

In *Hughes,* the in banc Ninth Circuit held that "[t]he relevant documents which Section 104(b)(4) requires disclosed are those documents that provide individual participants with information about the plan and benefits." 72 F.3d at 690. The Ninth Circuit cited *Werner v. Morgan Equip. Co.*, 15 Employee Benefit Cas. (BNA) 2295, 2301 (N.D. Cal.1992) as an example of the correct application of Section 104(b)(4). In the

latter case, the court held that a stock appraisal report -- one of the documents that Petitioners in this case had requested -- was an instrument under which the plan was established or operated because the plan at issue measured benefits by the value of stock. The reasoning of the in banc Ninth Circuit clearly would require disclosure of supporting financial information.

B. Participants in Plans Located in the Fourth Circuit Will Be Denied Access to Information Necessary to Determine Whether Their Benefits Are Properly Calculated, Their Plan is Insured Against the Dishonesty of Those Who Handle the Plan's Assets or They Are Complying with the Applicable Tax Law

The Fourth Circuit's decision denies plan participants access to documents that are critical to the operation of employee benefit plans. Without the ESOP stock appraisal report and the documents upon which it is based, plan participants have no way to determine whether they are receiving the full amount of the retirement benefits promised to them under the plan. Without the bonding policy and the IRS determination letter, they cannot be assured that their retirement benefits are insured against the dishonesty of those handling the plan's assets or that the plan participants are not subject to current income tax on contributions made to their plan.

No document, other than the plan document itself, is more crucial to the operation of an ESOP than the stock appraisal report. It is this document that establishes the value of the ESOP stock and that stock makes up the participant's retirement benefit. Any error in the appraisal impacts directly on the participant's retirement benefits. ESOPs are almost entirely invested in the sponsoring employer's stock. Thus, any reduction in the price of the sponsoring employer's stock reduces ESOP participants' benefits by a corresponding

percentage. Appendix at 29a-30a. (Michael, J. dissenting) and citations therein.

Participant oversight is crucial because a sponsoring employer has the ability to manipulate the stock price to its financial benefit. It is the appraisal report that establishes the price of the stock in purchase and sale transactions between the sponsoring employer and the ESOP. As the dissent below correctly recognized, access to an ESOP appraisal and its supporting financial information is especially important given "the inherent conflict of interest between the ESOP and the sponsor's corporation, both of which are buyers and sellers of the corporation's shares." If participants do not have access to this information, there will be no check on the accuracy of the appraisal. Appendix at 31a-32a.

An ESOP provides a multitude of benefits to sponsoring employers. And, it exposes participants to the risk of non-diversification of investments as well as manipulation of the stock price by the employer. In light of the significant potential for abuse, participants must have access to the information necessary to ensure, at a minimum, that the stock in their account -- their retirement benefit under the plan -- is accurately valued. Appendix at 32a.

CONCLUSION

The Fourth Circuit's holding that disclosure under Sections 104(b)(4) and 404(a)(1)(A) excludes such basic plan documents as the appraisal used to determine the value of participants benefits, the IRS determination letter and bonding policy conflicts with the holdings of the Sixth and Ninth Circuits. Furthermore, the Sixth and Ninth Circuits do not agree on the appropriate standard. Unless this Court resolves this morass and defines the obligations of disclosure to participants under Sections 104(b)(4) and 404(a)(1)(A), plan administrators, sponsoring employers, trustees, and participants

will have no idea what documents must be provided. And, more importantly, plan participants will be unable to verify whether their benefit accounts are honestly or fairly valued.

Respectfully Submitted,

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October 31, 1996

APPENDIX A
United States Court of Appeals
for the Fourth Circuit

No. 95-1275

JANICE FAY FAIRCLOTH; EVELYN D. FREDERICK;
CALLWEALL W. SMILING,
Plaintiffs-Appellants,

v.

LUNDY PACKING COMPANY; ANNABELLE L. FETTERMAN,
Trustee Lundy Packing Company Stock Ownership Plan;
MABEL F. HELD, Trustee Lundy Packing Company
Stock Ownership Plan,
Defendants-Appellees,

and

JOHN DOES,
Defendants.

AMERICAN ASSOCIATION OF RETIRED PERSONS;
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION,
Amici Curiae.

March 4, 1996, Argued
August 2, 1996, Decided

Appeal from the United States District Court
for the Eastern District of North Carolina, at Fayetteville.
Malcolm J. Howard, District Judge.
(CA-93-45-3-H).

Before HAMILTON, WILLIAMS, and MICHAEL, Circuit Judges. Affirmed in part, reversed in part and remanded by

published opinion. Judge Hamilton wrote the opinion, in which Judge Williams joined. Judge Michael wrote a separate opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: Marc H. Rifkind, SLEVIN & HART, Washington, D.C., for Appellants. Susanna Knutson Gibbons, POYNER & SPRUILL, L.L.P., Raleigh, North Carolina, for Appellees. **ON BRIEF**: Barry S. Slevin, SLEVIN & HART, Washington, D.C.; Martha Ann Geer, PATTERSON, HARKAVY & LAWRENCE, Raleigh, North Carolina, for Appellants. Robin Tatum Morris, POYNER & SPRUILL, L.L.P., Raleigh, North Carolina, for Appellees. Daniel Feinberg, Jeffrey Lewis, SIGMAN, LEWIS & FEINBERG, Oakland, California; Joan S. Wise, Cathy Ventrell-Monsees, Mary Ellen Signorille, AMERICAN ASSOCIATION OF RETIRED PERSONS, Washington, D.C., for Amici Curiae.

OPINION

HAMILTON, Circuit Judge:

Janice Fay Faircloth, Evelyn D. Frederick, and Callweall W. Smiling (the Appellants), three participants in the employee stock ownership plan (the ESOP) of Lundy Packing Company (Lundy), brought this action against Lundy, which is the ESOP's administrator, and Annabelle L. Fetterman and Mabel F. Held, who are the ESOP's trustees. The Appellants alleged that Lundy, Fetterman, and Held violated provisions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, by refusing to furnish certain documents to the Appellants. On October 12, 1994, the district court granted partial summary judgment in favor of Lundy, Fetterman, and Held. On January 20, 1995, the district court granted summary judgment in favor of the Appellants on their remaining claims and imposed penalties

on Lundy for its refusal to furnish some of the documents to the Appellants. The Appellants appeal both orders.[1] We affirm in part, reverse in part, and remand with instructions.

I.

Lundy, a North Carolina closely held corporation that sells pork products, established the ESOP in 1976. Lundy employees who have completed one year of employment with Lundy are eligible to participate in the ESOP. The ESOP provides benefits to participants upon defined events, such as retirement. Lundy maintains an account for each participant and provides each participant with an annual statement of her or his account. The amount of a participant's benefits under the ESOP is based on the participant's account balance.

The majority of the assets of the ESOP are invested in Lundy stock. An independent appraiser values Lundy stock and provides Lundy with an appraisal report on an annual basis. Lundy uses the valuation contained in the annual appraisal reports in calculating the account balances of ESOP participants.

In 1992, the Appellants received statements of account showing that the value of Lundy stock declined by approximately 42% between June 1991 and July 1992 and that their account balances had dropped as a result. When the Appellants received these statements of account, the United Food and Commercial Workers Union (the Union) was conducting an organizational campaign at Lundy. Concerned about the drop in their account balances, the Appellants turned to a Union representative for assistance in determining why the value of Lundy stock had declined. The Union then

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[1] The American Association of Retired Persons and the National Employment Lawyers Association have filed a brief *amici curiae* in support of the Appellants.

prepared identical letters, dated March 23, 1993, that each of the Appellants signed, requesting the following documents from Lundy in its capacity as plan administrator: (1) the plan document; (2) the trust agreement; (3) the latest summary plan description (SPD); (4) any other rules and regulations governing the ESOP; (5) the last three annual reports (Form 5500s); (6) the last three audited financial statements for the ESOP; (7) the last three summary annual reports; (8) the last three summaries of material modifications; (9) any contracts between the ESOP and any third party, including insurance contracts and contracts with custodians of assets and investment managers; (10) any policies adopted by the ESOP's fiduciaries, including any investment policy, trustee expense policy, cost-sharing policy, and funding policy; (11) any insurance policy and/or bonding policy covering the ESOP and its fiduciaries; (12) minutes of any meeting regarding the ESOP during the last three years; (13) the last IRS determination of tax qualification for the ESOP; and (14) the results of discrimination tests under I.R.C. §§ 401(k) and 401(m).

On April 19, 1993, after reviewing the requests with Fetterman, Held notified the Appellants that Lundy would only provide them with the plan document, the trust agreement, the latest SPD, and the last three summary annual reports. Held also informed the Appellants that no summaries of material modifications existed and asked the Appellants to clarify requests nine, ten, and twelve. The Appellants never provided a clarification of these requests.

On May 25, 1993, the Appellants sent Lundy another letter--this time requesting all appraisal reports regarding Lundy stock and "any and all documents concerning [Lundy's] financial status and operations supplied to the person or entity that prepared each appraisal or valuation report[ ]." (J.A. 42). Two days later, the Appellants filed this action against Lundy,

Held, and Fetterman, claiming that they had violated ERISA by refusing to provide the documents requested in the March 23 letter.

On June 18, 1993, Held, acting on behalf of Lundy, denied the Appellants' May 25 requests, but informed the Appellants that upon further review of the March 23 requests, Lundy had determined that they were entitled to the last three Form 5500s. Accordingly, Held provided those documents to the Appellants. On July 21, 1993, the Appellants amended their complaint to allege that Lundy's refusal to provide the documents requested on May 25 constituted an additional violation of ERISA.

After conducting discovery, both sides moved for summary judgment. On October 12, 1994, the district court granted partial summary judgment in favor of Lundy, Held, and Fetterman. The district court determined that the Appellants were not entitled to most of the documents they requested, but reserved judgment on whether the Appellants were entitled to copies of contracts with custodians of assets, investment managers, and insurers of plan assets. On January 20, 1995, the district court determined that the Appellants were entitled to these contracts and granted summary judgment in favor of the Appellants regarding these contracts. The district court also ordered Lundy to pay each Appellant $ 2500 as penalties for Lundy's delay in furnishing the Appellants with the Form 5500s and for its failure to furnish the Appellants with the contracts with custodians of assets, investment managers, and insurers of plan assets. The Appellants appeal both of the district court's orders, contending that the district court erred in determining that they were not entitled to certain documents they requested and in imposing insufficient penalties against Lundy.

II.

The Appellants argue that the district court erred in determining that they were not entitled to receive five sets of documents: (1) the last IRS determination of tax qualification; (2) the bonding policy covering the ESOP and its fiduciaries; (3) the appraisal reports and supporting documentation; (4) the minutes of meetings regarding the ESOP during the last three years; and (5) the investment, funding, cost-sharing, and trustee expense policies. They claim that they are entitled to these documents under three sections of ERISA: § 104(b)(4). § 404(a)(1)(A), and § 404(a)(1)(D). We shall address each of these provisions in turn.

A.

ERISA § 104(b)(4) provides:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or *other instruments under which the plan is established or operated.* The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

29 U.S.C. § 1024(b)(4) (emphasis added). In this case, we must interpret the meaning of the emphasized language and determine whether the emphasized language encompasses the documents requested by the Appellants.

When confronted with a question of statutory interpretation, our inquiry begins with an examination of the

language used in the statute. *See Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1482 (4th Cir. 1996). If the statutory language is clear and unambiguous, our inquiry ends there as well; we neither resort to an examination of the statute's legislative history nor apply the traditional rules of statutory construction. *Id. See Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917) ("The rules which are to aid doubtful meanings need no discussion" when the statutory language is clear and unambiguous.).

Here, the statutory language "other instruments under which the plan is established or operated" is clear and unambiguous. "Instrument" means "[a] formal or legal document in writing, such as a contract, deed, will, bond, or lease. . . . Anything reduced to writing, a document of a formal or solemn character . . . ." Black's Law Dictionary 801 (6th ed. 1990); *see also* Webster's New World Dictionary 700 (3d college ed. 1991) (defining "instrument" as "a formal document, [such] as a deed, contract, etc."). "Establish" means "to order, ordain, or enact . . . permanently" or "to set up." Webster's New World Dictionary at 465. "Operate" means "to conduct or direct the affairs of (a business, etc.); manage." *Id.* at 949. Therefore, the language "other instruments under which the plan is established or operated" encompasses formal or legal documents under which a plan is set up or managed. The language at issue being unambiguous, we do not resort to an examination of ERISA's legislative history nor apply the rules of statutory construction. *See Stiltner*, 74 F.3d at 1482.

Although the dissent does not even suggest that the language at issue is ambiguous, nor could it, it nonetheless heavily relies on ERISA's legislative history in support of its unduly broad interpretation. As previously set forth, any reliance on ERISA's legislative history in this case is prohibited. *Id.*

The Appellants and the Amici argue that § 104(b)(4) should be construed broadly to encompass any documents that would assist participants and beneficiaries in determining their rights under a plan and in determining whether a plan is being properly administered. They assert that other courts have interpreted § 104(b)(4) broadly.[2] But our examination of the two circuit court cases addressing the scope of § 104(b)(4) does not convince us that § 104(b)(4) should be construed broadly. *See Hughes Salaried Retirees Action Comm. v. Administrator of the Hughes Non-Bargaining Retirement Plan,* 72 F.3d 686 (9th Cir. 1995) (*en banc*); *Bartling v. Fruehauf Corp.*, 29 F.3d 1062 (6th Cir.1994).[3]

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[2] The Appellants also argue that the scope of § 104(b)(4) is broad because it is coextensive with § 107, which requires plan administrators and others to maintain an extensive array of documents that verify information contained in reports that must be filed with the government. *See* 29 U.S.C. § 1027. The Appellants argue that documents required to be maintained under § 107 must be furnished on request under § 104(b)(4). The Appellants have not cited any case holding that the scope of § 104 (b)(4) is coextensive with § 107, and we have not found one. Moreover, nothing on the face of the two statutes indicates that they are coextensive. Section 104(b)(4) does not in any way reference § 107, and the two statutes do not use similar language. Therefore, § 107 and § 104(b)(4) are not coextensive.

[3] Although one case in this circuit touches on the meaning of § 104 (b)(4), it does not delineate the scope of documents encompassed by the statute. *See Aliff v. BP America, Inc.* , 26 F.3d 486 (4th Cir. 1994). *Aliff* involved several ERISA issues, including a request for an actuarial report used to determine whether the plaintiffs would receive benefits under an involuntary separation program (ISP). The district court held that the plaintiffs were not entitled to the actuarial report under § 104(b)(4). The district court stated, "This statute does not require the plan administrator to supply a copy of the pertinent actuarial report. The Court also notes that Plaintiffs were provided with a copy of the ISP, the document 'under which the [severance] plan . . . [was] established or operated.'" *Aliff v. BP America, Inc.*, 826 F. Supp. 178, 188 (S.D.W. Va. 1993) (quoting § 104

In *Bartling*, the Sixth Circuit held that § 104(b)(4) encompassed an actuarial report required to be prepared by ERISA and a written calculation procedure used in deriving benefits under the plan. The court stated that "all other things being equal, courts should favor disclosure [under § 104 (b)(4)] where it would help participants understand their rights." *Bartling*, 29 F.3d at 1070. The court thus established a presumption of disclosure under § 104(b)(4). We find nothing in the clear and unambiguous statutory language to support such a presumption. Accordingly, we do not find *Bartling* persuasive.

In *Hughes*, certain retirees requested the plan administrator to furnish them a list of the names and addresses of all retired participants in the plan so that they could communicate with the other retirees regarding the plan and obtain assistance in monitoring the plan. The plan administrator used the list in paying benefits. A panel of the Ninth Circuit held that § 104(b)(4) encompassed the list because it was "critical to the operation" of the plan. *Hughes Salaried Retirees Action Comm. v. Administrator of the Hughes Non-Bargaining Retirement Plan*, 39 F.3d 1002, 1007 (9th Cir. 1995). During the pendency of the appeal in this case, the Ninth Circuit, sitting *en banc*, rejected the panel's interpretation of § 104(b)(4). The *en banc* court narrowed the broad interpretation of § 104(b)(4) adopted by the panel by stating:

(b)(4)). On appeal, we addressed certain issues in detail, but summarily affirmed the district court's rulings on other issues, including the § 104(b)(4) issue, "for the reasons stated in the district court's opinion." *Aliff*, 26 F.3d at 490. *Aliff* did not purport to delineate the scope of § 104(b)(4). It simply addressed the application of § 104(b)(4) to the particular document at issue in the case.

> [W]e decline to interpret § 104(b)(4) to require general disclosure, subject only to specified exceptions. On the contrary, § 104(b)(4) requires the disclosure of only the documents described with particularity and 'other instruments' similar in nature.

Hughes, 72 F.3d at 691. The *en banc* court further stated that "the relevant documents are those documents that provide individual participants with information about the plan and benefits." *Id.* at 690. Applying its interpretation of § 104(b)(4) to the document at issue in the case, the *en banc* court held that § 104(b)(4) did not encompass the list of retired participants because the list provided "no information about the plan or benefits." *Id.*

We will not speculate on how the Ninth Circuit would apply its decision in *Hughes* to the facts of this case. We note, however, that if Congress had intended § 104(b)(4) to encompass all documents that provide information about the plan and benefits, Congress could have used language to that effect. Instead, Congress used language limiting § 104(b)(4) to "instruments under which the plan is established or operated." The clear and unambiguous meaning of this statutory language encompasses only formal or legal documents under which a plan is set up or managed. To the extent that the Ninth Circuit's interpretation of § 104(b)(4) encompasses documents other than those under which a plan is set up or managed, the interpretation is unsupported by the statutory language and therefore unpersuasive.

Having ascertained the proper interpretation of § 104(b)(4), we now apply that interpretation to the documents at issue in this case.

1.

The Appellants requested the IRS determination letter showing that the ESOP is tax-qualified.[4] The determination letter does nothing to set up or manage the ESOP. Accordingly, § 104(b)(4) does not encompass the determination letter.

2.

The Appellants also requested the bonding policy insuring the ESOP against fiduciary misconduct. Like the determination letter, the bonding policy does nothing to set up or manage the ESOP. Accordingly, § 104(b)(4) does not encompass the bonding policy.

3.

The Appellants also requested "all appraisal reports or valuation reports of the Lundy Packing Company stock" and "any and all documents concerning Lundy Packing Company's financial status and operations supplied to the person or entity that prepared each appraisal or valuation report[ ]." (J.A. 42). The ESOP is not set up or managed under these documents. The appraisal reports simply derive the value of Lundy stock, and the supporting documents included in this request provide the raw material from which the appraisal report is derived. Accordingly, § 104(b)(4) does not encompass the appraisal reports or their supporting documentation.

4.

The Appellants also requested "minutes of any meetings regarding the [ESOP] during the last three years." (J.A. 30). According to the Department of Labor, certain minutes of

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[4] Tax qualification of an ESOP results in favorable tax treatment for the employer and the participants. See I.R.C. § 401(a).

trustees' meetings may fall within § 104(b)(4). *See, e.g.*, DOL Advisory Opinion Letter 87-010A (opining that § 104(b)(4) does not encompass minutes of a trustees' meeting in which the trustees reviewed the performance of an investment manager, but does encompass minutes of a trustees' meeting in which the trustees established a claim procedure); *but see Chambless v. Masters, Mates & Pilots Pension Plan*, 571 F. Supp. 1430, 1456 (S.D.N.Y. 1983) ("Neither ERISA nor the federal regulations issued thereunder make any mention of any requirement that plan participants be allowed to see the minutes of trustees' meetings or prior decisions by the trustees.").

We need not decide whether trustees' meeting minutes can ever constitute formal or legal documents under which a plan is set up or managed because here the Appellants' request for meeting minutes was too broad to fall within § 104(b)(4) and the Appellants refused to clarify the request. *See Anderson v. Flexel, Inc.*, 47 F.3d 243, 248 (7th Cir. 1995) (holding that a request for documents under § 104(b)(4) necessitates a response from an administrator when it gives the administrator "clear notice" of the information sought). The Appellants' request did not give any indication of the information sought by the Appellants. Their request for "any" meeting minutes "regarding" the ESOP in the last three years was akin to asking Lundy to comb the past three years of trustees' meeting minutes to determine if they contained any information that could possibly be encompassed by § 104 (b)(4). Accordingly, Lundy wrote to the Appellants seeking clarification of this request. Lundy stated, "Your request . . . is unclear, overly broad and does not appear to be within the scope of Section 104(b)(4) of ERISA. . . . It would be appreciated if you could further define your request . . . ." (J.A. 32). The Appellants refused to clarify the request. Therefore, assuming *arguendo* that § 104(b)(4) may encompass certain trustees' meeting minutes, Lundy did not

violate § 104(b)(4) by failing to provide the trustees' meeting minutes in this case.

5.

Finally, the Appellants requested "any policies adopted by the fiduciaries of the [ESOP], including, but not limited to, any investment policy, trustee expense policy, cost-sharing policy and funding policy." (J.A. 30). Lundy asked the Appellants to clarify this request and the Appellants refused.

On appeal, the Appellants assert that the cost-sharing policy determines the percentage of ESOP expenses that will be borne by the ESOP and by Lundy. They argue that they did not provide clarification of their request for this policy because "cost-sharing policy" is a term of art that any plan administrator should understand. But we cannot take judicial notice that the plan administrator should know the meaning of "cost-sharing policy." *See Minnesota Fed'n of Teachers v. Randall*, 891 F.2d 1354, 1359 n.9 (8th Cir. 1989) (refusing to take judicial notice of a fact for the first time on appeal). The record indicates that the plan administrator did not know what "cost-sharing policy" means. The ESOP does not use the term, and Held, who responded to the Appellants' requests on behalf of Lundy, the plan administrator, testified that she did not know what a cost-sharing policy is. Therefore, assuming *arguendo* that a cost-sharing policy, as defined by the Appellants, could constitute a formal or legal document under which a plan is managed, we conclude that the Appellants were not entitled to such a policy in this case.

Similarly, the Appellants were not entitled to receive a trustee expense policy. The Appellants assert that the trustee expense policy determines which expenses of the trustee will be paid by the ESOP. Whether such a policy could ever constitute a formal or legal document under which a plan is

managed is a question we need not decide, because the record does not indicate that such a policy exists in this case.

The Appellants were, however, entitled to the funding and investment policies. As described in the ESOP, the funding and investment policies set forth Lundy's obligations to fund the ESOP and explain the responsibilities regarding investing the assets of the ESOP. Thus, both the funding policy and the investment policy are formal documents under which the ESOP is managed. They are therefore encompassed by § 104(b)(4).

Moreover, the request for the funding and investment policies provided Lundy with clear notice as to the information sought by the Appellants. The ESOP contemplates the establishment of funding and investment policies, and the Appellants' request refers to the funding and investment policies by name. In her deposition testimony, Held indicated that she knew what a funding policy and an investment policy were and that the ESOP has a funding policy and an investment policy. Accordingly, we conclude that the Appellants' refusal to clarify their request for the funding and investment policies does not excuse Lundy's failure to provide these policies to the Appellants.

B.

The Appellants and the Amici next argue that even if Lundy, as the plan administrator, was not required to furnish the Appellants the requested documents under § 104(b)(4), Fetterman and Held, the plan fiduciaries who determined which documents Lundy would provide to the Appellants, were required to furnish the requested documents under ERISA § 404(a)(1)(A). Section 404(a)(1)(A) provides:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan . . . .

29 U.S.C. § 1104(a)(1)(A).

Section 404(a)(1)(A) is included in the fiduciary responsibility provisions of ERISA. *See* 29 U.S.C. §§ 1101-14. The fiduciary responsibility provisions invoke the common law of trusts. *See Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570, 86 L. Ed. 2d 447, 105 S. Ct. 2833 (1985); S. Rep. No. 127, 93d Cong. (1973), *reprinted* in 1974 U.S.C.C.A.N. 4639, 4865 ("The fiduciary responsibility section, in essence, codifies and makes applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts."). At common law, trustees have a duty to give beneficiaries upon request "complete and accurate information as to the nature and amount of the trust property." Restatement (Second) of Trusts § 173 (1959). And beneficiaries are "always entitled to such information as is reasonably necessary to enable [them] to enforce [their] rights under the trust or to prevent or redress a breach of trust." *Id.* cmt. c.

The Appellants and the Amici assert that the information requested by the Appellants will help the Appellants to enforce their rights and to prevent a breach of trust. They argue that the Appellants are therefore entitled to the information under § 404(a) (1)(A), because that statute

incorporates the common-law principle that beneficiaries are entitled to information that is reasonably necessary to enable them to enforce their rights or to prevent a breach of trust. The Appellants and the Amici thus argue that even if § 104 (b)(4) does not require the administrator of the ESOP to furnish the requested documents, § 404(a)(1)(A) requires the fiduciaries of the ESOP to furnish the requested documents.

To accept the argument of the Appellants and the Amici we would have to hold that ERISA's general fiduciary duty provision, § 404(a)(1)(A), requires plan fiduciaries to furnish documents to participants and beneficiaries in addition to the documents that ERISA's specific disclosure provision, § 104 (b)(4), requires the plan administrator to furnish. Such a holding would conflict with the principle that specific statutes govern general statutes. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992); *Farmer v. Employment Sec. Comm'n*, 4 F.3d 1274, 1284 (4th Cir. 1993). "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107, 88 L. Ed. 1163, 64 S. Ct. 890 (1944) (quoting *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208, 76 L. Ed. 704, 52 S. Ct. 322 (1932)). This principle "applies with special force with regard to a reticulated statute such as ERISA." *Bigger v. American Commercial Lines*, 862 F.2d 1341, 1344 (8th Cir. 1988); *see also Pension Benefit Guar. Corp. v. Alloytek, Inc.*, 924 F.2d 620, 626 (6th Cir. 1991).

In *Bigger*, the court rejected an attempt to use the general fiduciary duty standard of § 404(a)(1)(A) to expand the duties imposed under another ERISA section that specifically governed the situation at issue. 862 F.2d at 1344. We likewise decline to use § 404(a)(1)(A) to expand the duties imposed under § 104(b)(4), the ERISA section that specifically governs

the situation at issue here--a request for documents related to the ESOP. As the Supreme Court has noted, ERISA's reporting and disclosure scheme, which includes § 104(b)(4), "may not be a foolproof informational scheme, although it is quite thorough. Either way, it is the scheme that Congress devised. And we do not think Congress intended it to be supplemented by a far-away provision in another part of [ERISA.]" *Curtiss-Wright Corp. v. Schoonejongen*, 131 L. Ed. 2d 94, 115 S. Ct. 1223, 1231 (1995).

The Appellants and the Amici maintain that the case law construing § 404(a)(1)(A) supports their position that § 404 (a)(1)(A) requires plan fiduciaries to furnish information to participants and beneficiaries in addition to the documents that § 104(b)(4) requires plan administrators to furnish. Our review of the case law, however, reveals no support for their position.

The Appellants and the Amici rely mainly on the panel opinion in *Hughes*, 39 F.3d 1002 (9th Cir. 1995). The panel stated that § 404(a)(1)(A) may, under some circumstances, require the furnishing of information in addition to the information required to be furnished by § 104(b)(4). *Id.* at 1006 (citing *Acosta v. Pacific Enters.*, 950 F.2d 611, 618 (9th Cir. 1991)). As noted above, however, during the pendency of this appeal, the Ninth Circuit, sitting *en banc*, vacated the panel opinion in *Hughes*. The *en banc* court expressly declined to decide "[w]hether § 404(a)(1)(A), a general ERISA provision, may be interpreted to require the disclosure of documents that relate to the provision of benefits or the defrayment of expenses but are not documents required to be disclosed under § 104(b)(4), ERISA's specific disclosure provision." *Hughes*, 72 F.3d at 694.

The other cases cited by the Appellants and the Amici in support of their argument merely hold that ERISA fiduciaries

may not mislead participants or beneficiaries; the cases do not recognize a general fiduciary obligation under ERISA to provide information related to the plan on request. *See Howe v. Varity Corp.*, 36 F.3d 746, 753 (8th Cir. 1994) (holding that an employer who used misrepresentations to induce employees to transfer to a newly created, undercapitalized sister company, with the intention of ridding itself of obligations under an employee benefit plan, violated § 404 (a)(1)(A)), *aff'd*, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994) (holding that plan administrators may not make affirmative material misrepresentations to plan participants regarding changes to employee benefit plans); *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) (stating that trustees have a duty not to misinform beneficiaries and to disclose information to beneficiaries when the trustee knows that failure to disclose might be harmful to beneficiaries); *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 991-92 (7th Cir. 1993) (holding that defendants breached their fiduciary duties by persuading a plan participant to designate one of the defendants the beneficiary of his life insurance policy, where the participant was led to believe that he was required to make the designation in order to receive his benefits); *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir.) (holding that "[a] plan administrator may not make affirmative material misrepresentations to plan participants about changes to an employee pension benefit plan"), *cert. denied*, 510 U.S. 1020, 126 L. Ed. 2d 586, 114 S. Ct. 622 (1993); *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992) (holding that an employer violated its fiduciary duties by misleading employees regarding the availability of participation in a plan), *cert. denied*, 508 U.S. 940, 124 L. Ed. 2d 639, 113 S. Ct. 2416 (1993); *Eddy v. Colonial Life*

Ins. Co., 287 U.S. App. D.C. 76, 919 F.2d 747, 750-51 (D.C. Cir. 1990) (holding that an ERISA fiduciary violated its fiduciary duties when a participant whose insurance coverage was being terminated inquired about the possibility of maintaining coverage and the fiduciary failed to disclose sufficient information regarding his options for maintaining coverage); *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988) (holding that "a fiduciary may not materially mislead those to whom the duties of loyalty and prudence described in [§ 404] are owed"). Here, the Appellants do not allege that they have been misled; they allege that they need the requested information to exercise an oversight role regarding the ESOP. Therefore, the cases discussed above are inapposite.

C.

The Appellants argue that even if they are not entitled to the requested documents under § 104(b)(4) or § 404(a)(1)(A), they are entitled to the documents under § 404(a)(1)(D). Section 404(a)(1)(D) requires plan fiduciaries to discharge their duties with respect to a plan "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). The Appellants assert that the SPD, one of the documents and instruments governing the ESOP, entitles them to obtain the documents they requested. They accordingly maintain that Fetterman and Held violated § 404(a)(1)(D) by failing to furnish the Appellants with the requested documents.

ERISA authorizes the Secretary of Labor to promulgate a regulation requiring administrators of employee benefit plans to provide participants with a statement of their rights under ERISA. *See* 29 U.S.C. § 1024(c). Pursuant to this authorization, the Secretary has promulgated a regulation requiring SPDs to contain a statement of ERISA rights. *See*

29 C.F.R. § 2520.102-3(t)(1). The regulation also sets forth a model statement of ERISA rights. *See* 29 C.F.R. § 2520.102-3 (t)(2). The SPD language relied upon by the Appellants here tracks, almost verbatim, the model statement of ERISA rights set forth in the regulation.[5] Thus, the language relied on by the Appellants is included in the SPD in an attempt to comply with the regulation. The language does not create additional disclosure obligations beyond the disclosure obligations imposed by ERISA.

To summarize, we conclude that neither § 404(a)(1)(A) nor § 404(a)(1)(D) requires Fetterman and Held to furnish the documents at issue in this case to the Appellants. However, § 104(b)(4) requires Lundy to furnish the funding and investment policies to the Appellants. We now proceed to consider the Appellants' arguments regarding the appropriate penalties for Lundy's failure to furnish the Appellants all the documents to which they were entitled under § 104(b)(4).

III.

Under ERISA § 502(c)(1), a district court may, in its discretion, assess penalties of up to $ 100 a day against plan administrators who fail to furnish requested documents that are required to be furnished by § 104(b)(4). *See* 29 U.S.C.

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[5] The SPD states:

> 16. ERISA RIGHTS. As a Member in the Plan you are entitled to certain rights and protections under [ERISA]. ERISA provides that all Plan Members shall be entitled to:
>
> (a) Examine, without charge, . . . all Plan documents, including insurance contracts . . . .
>
> (b) Obtain copies of all Plan documents and other Plan information upon written request to the Plan Administrator. . . .

(J.A. 210).

§ 1132(c)(1); *Glocker v. W.R. Grace & Co.*, 974 F.2d 540, 544 (4th Cir. 1992). In accordance with this discretionary authority, the district court ordered Lundy to pay each Appellant $2500 because of Lundy's delay in furnishing the Form 5500s and its failure to furnish the contracts with custodians of assets, investment managers, and insurers of Plan assets. The Appellants argue that the district court should have imposed a larger penalty against Lundy.

The purpose of § 502(c)(1) is not to compensate participants for injuries, but to punish noncompliance with ERISA. *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1494 (11th Cir. 1993). Accordingly, prejudice to the party requesting the documents is not a prerequisite to the imposition of penalties. *See Moothart v. Bell*, 21 F.3d 1499, 1506 (10th Cir. 1994). But prejudice is a factor that a district court may consider in deciding whether to impose a penalty. *Id.* The district court may also consider whether the administrator acted in bad faith. *See Rodriguez-Abreu v. Chase-Manhattan Bank, N.A.* , 986 F.2d 580, 588 (1st Cir. 1993).

The district court determined that Lundy did not act in bad faith and that the Appellants did not suffer prejudice as a result of Lundy's refusal to furnish the Form 5500s and the contracts with custodians of assets, investment managers, and insurers of plan assets. We find no reversible error in these determinations as they relate to the Form 5500s and the contracts with custodians of assets, investment managers, and insurers of plan assets. However, in light of our conclusion that § 104(b)(4) encompasses the funding and investment policies and that clarification of the Appellants' request for these documents was not necessary, we remand to the district court to determine whether, in its discretion, any additional

penalties should be imposed because of Lundy's failure to furnish these policies to the Appellants.[6]

IV.

For the reasons stated herein, the district court's determination that the Appellants were not entitled to the funding and investment policies is reversed. In all other respects, the district court's orders are affirmed. The case is remanded for the district court to determine whether, in its discretion, any additional penalties should be imposed on Lundy for its failure to furnish these policies.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS

MICHAEL, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion insofar as it provides for disclosure of the Plan's funding and investment policies, for non-disclosure of cost-sharing policies, trustee expense policies, and trustees' meeting minutes, and for a remand to determine whether a more severe penalty should be assessed.

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[6] The Appellants also argue that Fetterman and Held violated § 404 (a)(1) by breaching the fiduciary standards of loyalty and care. The Appellants maintain that in responding to their requests for documents, Fetterman and Held put the interests of Lundy before the interests of the ESOP participants and failed to exercise care in determining which documents they were required to furnish the Appellants. The Appellants seek the removal of Fetterman and Held as trustees of the ESOP because of these alleged fiduciary breaches. Removal of trustees is appropriate when the trustees have engaged in repeated or substantial violations of their fiduciary duties. *See* 29 U.S.C. § 1109; *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984). Assuming that the conduct of Fetterman and Held amounted to breaches of their fiduciary duties, the breaches were not substantial or repeated. Therefore, their removal as trustees is not warranted.

I respectfully dissent, however, from the majority's holding that Plan participants are not entitled to see appraisal reports (and supporting documentation), the Plan's tax determination letter, and the Plan's fiduciary bonding policy. The Plan participants should be allowed to see this latter group of documents because they are instruments under which the Plan is established or operated, because "all other things being equal, courts should favor disclosure where it would help participants understand their rights," *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1070 (6th Cir. 1994), and because Lundy has not shown good cause for nondisclosure.

I.

A.

Our task is to determine what Congress intended when it enacted ERISA § 104(b)(4), which provides for disclosure to plan participants of "instruments under which the plan is established or operated."

The majority's method of defining the term "instrument" is not grounded in the policies the drafters of ERISA sought to promote. Understanding Congressional will requires more than the mechanical application of dictionary definitions.[1] We must "look not only at the particular statutory language, but to the design of the statute as a whole and to its object and

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[1] In any event, there are dictionary definitions of "instrument" that are more suitable to § 104(b)(4)'s purposes than those relied upon by the majority. For example, an "instrument" includes: "[any] written document" (Black's Law Dictionary 719 (5th ed. 1979) (first definition)); "a means whereby something is achieved, performed, or furthered" (Webster's Third New Int'l Dictionary (Unabridged) 1172 (Merriam-Webster, 1981) (definition 1a)); or "something capable of being presented as evidence to a court for inspection" (*id.* (definition 5b)). In light of the wide range of definitions of the word "instrument," I respectfully disagree with the majority's contention that the word is unambiguous

policy." *Crandon v. United States*, 494 U.S. 152, 158, 108 L. Ed. 2d 132, 110 S. Ct. 997 (1990); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 116 L. Ed. 2d 578, 112 S. Ct. 570 (1991) ("the meaning of statutory language, plain or not, depends on context").

> It is always an unsafe way of construing a statute or contract to divide it by a process of etymological dissection, and to separate words and then apply to each, thus separated from its context, some particular definition given by lexicographers and then reconstruct the instrument upon the basis of these definitions. An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascribed from the context, the nature of the subject matter treated of, and the purpose or intention of the parties who executed the contract or of the body which enacted or framed the statute or constitution.

2A *Sutherland Statutory Construction* § 46.05, at 103 (5th ed. 1992) (footnote omitted).

The legislative history makes clear that "instrument" should be defined more broadly than the majority has defined it. Congress intended broad disclosure to Plan participants and beneficiaries because they are the primary enforcers of their rights under ERISA. The Senate Committee on Labor and Public Welfare explained that a Plan participant or beneficiary is entitled to know "exactly where he stands with respect to the plan." S. Rep. No. 127, 93 Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.S.C.A.N. 4838, 4863 ("ERISA Legislative History") (quoted in *Hughes Salaried Retirees Action Comm. v. Administrator*, 72 F.3d 686, 690 (9th Cir. 1995) (en banc)). The disclosure requirement of ERISA § 104

(b)(4) also serves to reinforce ERISA § 404, the fiduciary duty section:

> [T]he safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.

Id. (quoted in *Hughes*, 72 F.3d at 690 n. 3 (9th Cir. 1995) (en banc)); *see also Curtiss-Wright Corp. v. Schoonejongen*, 131 L. Ed. 2d 94, 115 S. Ct. 1223, 1231 (1995) (§ 104(b)(4) requires disclosure of all "governing plan documents"); Bartling, 29 F.3d at 1070 ("courts should favor disclosure where it would help participants understand their rights").

A look at the Welfare and Pension Plans Disclosure Act of 1958, Pub. L. No. 85-836 (Aug. 28, 1958), 72 Stat. 997, the precursor to ERISA § 104(b)(4), also aids in a proper understanding of ERISA. *See* 2A *Sutherland Statutory Construction* § 48.03 (court should consider development of statutory scheme over time "including prior statutes on the same subject"). The 1958 Act required disclosure only of "a description of the plan" and "an annual financial report." 72 Stat. at 999 (§ 5(a)). Congress amended the Act in 1962 to provide for more effective sanctions for its violation, to impose more detailed disclosure duties, and to require plan administrators to retain supporting documentation. Pub. L. No. 87-420 (Mar. 20, 1962), 76 Stat. 35. But Congress ultimately determined that even these measures were ineffective to adequately protect the rights of employees. ERISA Legislative History, 1974 U.S.C.C.A.N. at 4642. For that reason, when Congress passed ERISA in 1974, it

imposed a whole new set of disclosure duties on plan administrators. *Id.* Congressional will on this subject is plain: employees are given broad rights of access to materials necessary for them to understand whether their pension savings are secure.

Such a clear revelation of Congressional purpose leads me to believe that § 104(b)(4) was meant to impose on Plan fiduciaries a disclosure duty similar to that imposed on trustees under the common law of trusts. *See Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570, 86 L. Ed. 2d 447, 105 S. Ct. 2833 (1985); Restatement (Second) of Trusts § 173 (trustee, upon request of beneficiary, must disclose "complete and accurate information as to the nature of the trust property") & cmt. c ("the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust").

I do agree with the majority, ante at 12-16, that even though ERISA § 404(a)(1)(A) imports general common law principles of trusts, any duty to disclose that may exist under § 404 can be no broader than the specific disclosure duty described in § 104(b)(4). *See Bigger v. American Commercial Lines., Inc.*, 862 F.2d 1341, 1344 (8th Cir. 1988) ("a specific statutory provision prevails over a more general provision"). Nevertheless, I disagree with the majority's narrow reading of § 104(b)(4). The terms "instrument" and "established or operated" should be read broadly (although not without limit, *see infra* Part III) to best serve the remedial goals of ERISA and to ensure that Plan participants and beneficiaries have enough information to adequately enforce their rights under the Plan.

B.

The main difficulty in this case flows from the fact that Congress did not expressly indicate how § 104(b)(4) should be applied in the special context of an employee stock ownership plan (ESOP). A brief discussion is in order, then, of what an ESOP is, what it does, and how its existence benefits the employer/sponsor. In a nutshell, § 104(b)(4) must be read broadly in the ESOP situation because ESOP investments can be riskier than many other investments. Maximum disclosure should be required so employees will have all the information necessary for them to understand and manage the risk associated with their ESOP investment.

An ESOP is a defined-contribution pension or welfare plan that invests primarily in the stock of the employer. 26 U.S.C. § 4975(e)(7). Other forms of employee stock ownership exist, but the term "ESOP" has this specialized meaning. *See* Joseph R. Blasi & Douglas L. Kruse, *The New Owners: The Mass Emergence of Employee Ownership in Public Companies and What It Means to American Business* 23-29 (1991).

The term "defined-contribution" means that a certain amount of money is contributed into the plan (by the employer or the employee), but the value of the assets at the time they are withdrawn from the plan (say, at retirement) is not guaranteed. A "defined-benefit" plan, by contrast, is one in which the employer (sponsor) guarantees to pay a certain fixed benefit when the benefit is due; the employer, therefore, must rely on actuarial projections in funding a defined-benefit plan so it will have enough assets to meet future obligations. The key distinction between the two types of plans is how they allocate risk between employer and employee. With a defined-contribution pension plan, the employee bears the risk that the plan's investments will do poorly. The employee also

bears the risk that he will outlive his retirement savings ("longevity risk"). A further risk is that unlike defined-benefit plans, defined-contribution plans are not guaranteed by the Pension Benefit Guarantee Association. With a defined-benefit plan, the employer bears the investment and longevity risks, but employees bear the risk that by the time they retire inflation will have diminished the real value of their benefits. A defined-contribution plan potentially could give greater benefits to employees because employees retain the additional return if the plan's investments exceed expectations. Administrative costs of operating a defined-contribution plan also are lower than the costs of operating a standard defined-benefit plan. *Id.* at 22; *see also* Douglas L. Kruse, *Pension Substitution in the 1980s: Why the shift toward defined contribution?*, 34 Indus. Rel. 218 (Apr. 1995).

A corporate employer which introduces an ESOP (as opposed to a standard defined-contribution plan) gains advantages beyond shifting investment and longevity risks to its employees. There is some evidence that implementation of an ESOP makes workers feel they have more of a stake in the corporation and that loyalty and productivity improve as a result. *See, e.g.*, Michael A. Conte, *Economic Research and Public Policy Toward Employee Ownership in the United States*, 28 J. Econ. Issues 427 (June 1994); Aaron A. Buchko, *Employee Ownership, Attitudes, and Turnover: An Empirical Assessment*, 45 Hum. Rel. 711 (July 1992). *But see* Wallace N. Davidson III & Dan L. Worrell, *ESOP's Fables: The influence of employee stock ownership plans on corporate stock prices and subsequent operating performance*, 17 Hum. Resource Planning 69 (1994).

The most important advantages an ESOP brings to a corporate employer, however, relate to the corporation's interaction with capital markets. Use of an ESOP provides a corporation with a cheap and ready source of capital that may

be used for expansion, to pay down debt, or (as may be the case with a closely-held corporation) to buy out a minority shareholder. *See* Kruse, *Pension Substitution*. ESOPs also may benefit management (sometimes at shareholder expense) by making the corporation more resistant to a hostile takeover. *See* Blasi & Kruse at 139-210. The effect of the existence of an ESOP on a takeover attempt or proxy fight depends on a wide range of factors, but within the business community ESOP implementation is largely perceived as a strategy favoring incumbent management. *See generally* Randall Smith, *Takeover Bid for NCR Gets Boost in Court*, Wall St. J., Mar. 20, 1991, at A3; Kevin G. Salwen & David B. Hilder, *MacMillan Officers Charged in Failure to Disclose ESOP Was Takeover Defense*, Wall St. J., Dec. 7, 1989; Craig P. Dunn, *ESOPs: The 'Trojan Horse" of the Antitakover Realm*, Business Horizons, July 1, 1989, at 28; Frank Altmann, *Manager's Journal: Another Battle in the Takeover Wars, Or Just an ESOP Fable?*, Wall St. J., June 12, 1989; David B. Hilder & Randall Smith, *ESOP Defenses Are Likely to Increase*, Wall. St. J., Apr. 6, 1989.

From an employee's perspective, an ESOP is much riskier than the typical defined-contribution plan. When much of an employee's retirement savings is tied up in an ESOP, the employee bears significant risks associated with the fact that his retirement savings are not diversified. This risk is unique to ESOPs and is not present in the typical defined-contribution plan. It has been said that "ESOPs, which tie retirement income to the fate of a single company, violate good portfolio management." Daniel J.B. Mitchell, *Profit Sharing and Employee Ownership: Policy Implications*, 13 Contemp. Econ. Pol'y 16 (Apr. 1995). In short, "most employee-ownership plans do not have a safety net." Blasi & Kruse at 246.

> [I]nvestment in an employer's securities subjects plan participants to a double risk of loss. If an employer has severe financial reverses, his employees may not only lose their jobs (and the employer's contributions for their retirement may substantially decrease), but also they may suffer a loss from decreases in the securities' value and dividends.

S. Rep. No. 383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4983; *see also Martin v. Feilen*, 965 F.2d 660, 664 (8th Cir. 1992) ("an ESOP places employee retirement assets at much greater risk than does the typical diversified ERISA plan"), *cert. denied*, 506 U.S. 1054 (1993); William R. Levin, *The False Promise of Worker Capitalism: Congress and the Leveraged Employee Stock Ownership Plan*, 95 Yale L.J. 148, 168 (1985) ("Workers own a single asset far riskier than they would otherwise choose. In the event of bankruptcy, workers lose their jobs and their pension assets."); Bob Ortega, *Life Without Sam: What Does WalMart Do if Stock Drop Cuts Into Workers' Morale*, Wall St. J., Jan. 4., 1995, at A1 (husband and wife in their seventies, both employees at same company, cannot afford to retire due to precipitous drop in company's stock value); James A. White, *As ESOPs Become Victims of '90s Bankruptcies, Workers Are Watching Their Nest Eggs Vanish*, Wall St. J., Jan. 25, 1991, at C1.

This concern is especially important in this case, where in the space of one year Lundy's assessed share value fell more than 40 percent.[2] The decline in value of Lundy stock caused the value of plaintiff Evelyn D. Frederick's ESOP

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[2] Strangely, in the same year Lundy's net earnings were nearly $ 2 million.

retirement investment to fall $11,375.63. Plaintiff Callweall Smiling, a retiree from Lundy, lost $33,559.11 due to the sudden decline. Frederick said, "[W]hen you see stock fall all of a sudden like this, it makes you wonder: What are you looking at towards the future [ ] [ ]; when I retire [ ] [ ] will there be anything there for me? So, I needed to -- I just need to know." The plaintiffs are asking one of the most basic questions a worker can ask, *i.e.*, is my retirement secure, and the company is refusing to give them the information they need to know the answer.

A final concern with ESOPs is the inherent conflict of interest between the ESOP and the sponsor corporation, both of which are buyers and sellers of the corporation's shares. Like all corporations, the sponsor wishes to buy its own shares cheap and sell them dear. When the same people manage both the ESOP and the sponsor company, as in this case, employees need to know that share prices have not been manipulated for the benefit of the sponsor. "[T]he fiduciary may well be subject to great pressure to time the purchases and sales [of shares] so as to improve the market in those securities, whether or not the interests of protecting retirement benefits of plan participants may be adversely affected." S. Rep. No. 383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4983. This danger is maximized in the case of a closely-held corporation like Lundy due to the absence of any general stock market check on the potential for value manipulation. *See Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251, 82 L. Ed. 2d 839, 104 S. Ct. 3533 (1984).[3]

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[3] I do not mean to suggest that an ESOP never is an appropriate method of corporate finance. There are notable examples of ESOP success stories. ESOP implementation at Weirton Steel, for example, saved the company from bankruptcy, preserved jobs, and allowed employees to

Because of high risk to employees, great benefits to employers, and built-in conflict between the two, employees must be given maximum ability to protect their substantial investment, both financial and personal, in their ESOP. ERISA grants employees this protection by imposing broad duties of disclosure under § 104(b)(4). I therefore would give sufficient scope to the terms "instrument" and "established or operated" to ensure that employees have access to information that would help them understand exactly how secure their retirement savings are. An employee should be allowed to know enough so he can make an informed judgment on whether Plan fiduciaries are making prudent decisions, including whether they are buying and selling shares of the sponsor company at a fair price. When all of an employee's eggs are in one basket, he should be allowed to know how strong or weak the basket is.

II.

I turn now to a more specific discussion of the documents I believe the plaintiffs are entitled to have.

A. *The Tax Determination Letter*

Plan participants have a right to see the Plan's tax determination letter because the Plan is not a valid ESOP unless it "is qualified" within the meaning of 26 U.S.C. § 4975(e)(7). Thus the letter is an instrument under which the Plan is "established," and without the letter the Plan may not "operate." Under 26 U.S.C. §§ 401-404, qualified ESOP plans receive preferential tax treatment. Most importantly, employer contributions to the Plan are not taxable to employees in the year of contribution. If the Plan is not

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share in the company's future successes. *See Alex Kotlowitz, Pilots' Offer May Spur Other Unions to Attempt to Purchase Companies*, Wall St. J., Apr. 17, 1987.

properly tax-qualified, employees are liable for tax on employer contributions in the year those contributions are made. This result would mean hardship for employees because they would be required to pay tax on contributions converted into what could be highly illiquid (and in this case, substantially underperforming) assets, assets whose value they will not enjoy until retirement, which might be many years away. Although the Plan's Form 5500 Annual Report represents that a positive determination letter has been issued and that the Plan is therefore properly tax-qualified, the only way Plan participants can confirm the Plan's tax status is to see a copy of the letter issued by the IRS. Thus, Plan participants need to see the letter so they can be sure that their own tax returns are accurate. *See Sage v. Automation, Inc. Pension Plan & Trust*, 845 F.2d 885, 894 n.4 (10th Cir. 1988).

B. *The Bonding Policy*

Both the Plan and ERISA § 412(a) require Plan fiduciaries to be bonded. Because the Plan cannot operate without fiduciaries, and fiduciaries cannot be appointed unless they are bonded, the Plan cannot operate without some sort of bonding policy. Hence, I would treat the bonding policy as an instrument under which the Plan is "operated" because the policy is "indispensable to the operation of the plan." *Bartling*, 29 F.3d at 1070. Even though the Annual Report says the trustees are bonded and discloses the amount of the bond and the name of the surety company, participants should be able to examine the bonding policy and its terms to ensure that their interests are adequately protected.

C. *The Appraisal Reports and Supporting Documentation*

The Plan Administrator uses the appraisal reports to determine the price at which the Plan buys and sells Lundy shares. The Administrator also uses the reports to inform Plan

participants how much their retirement accounts are worth. Thus, the reports are instruments under which the Plan is operated.

An ESOP's core function is to buy and sell shares of the sponsor corporation. Plan fiduciaries are required to ensure that the Plan does not pay too much or receive too little for those shares. An accurate valuation of those shares, then, is absolutely critical to the Plan's operation. Plan participants are entitled to know how the value of their shares is calculated in order to assess whether Plan fiduciaries are faithfully protecting employee interests. *Werner v. Morgan Equip. Co.*, 15 Employee Benefits Cas. (BNA) 2295 (N.D. Cal. 1992); *see Bartling* (actuarial report); *cf. Simpson v. Ernst & Young*, 879 F. Supp. 802, 824 (S.D. Ohio 1994) (method by which benefits are calculated); *Lee v. Dayton Power & Light Co.*, 604 F. Supp. 987, 1002 (S.D. Ohio 1985) (manual describing method of benefit calculation). Just because Lundy commissioned an independent appraisal does not mean Plan participants' interests have been adequately protected. "An independent appraisal is not a magic wand that fiduciaries may simply wave over a transaction to ensure that their responsibilities are fulfilled." *Donovan*, 716 F.2d at 1474. For these reasons, I would hold that the stock valuation report and supporting documentation are instruments under which the Plan is operated. [4]

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[4] The defendants cannot claim that disclosure would be burdensome. The Plan Administrator is already required to maintain backup documentation for all mandatory government filings, *see* ERISA § 107, and the Administrator may charge participants and beneficiaries a reasonable copying cost, *see* 29 C.F.R. § 2520.104b-30.

III.

The Plan's duty to disclose documents relating to the finances of the sponsor corporation is not, however, limitless. Because ESOP Plan participants ultimately are the owners of the sponsor corporation in the same manner as corporate shareholders are, I believe the rights of Plan participants who seek corporate documents are analogous to the rights of shareholders to inspect the books and records of a corporation. But I also believe that the rights of Plan participants to inspect corporate documents should be subject to limitations similar to those imposed on shareholders.

> The law of every state permits inspection of corporate records by stockholders, directors, or other interested parties. Although not a right which attaches universally to corporate shares in the absence of common law or statute, it is a right which courts have been liberal in affirming not only for shareholders, but equitable owners, beneficial owners, and even quasi-owners. In its common-law form, the right to inspect gives the shareholder seeking information for a "proper purpose" access to all significant corporate documents.

2 Roger J. Magnuson, *Shareholder Litig.* § 14.08, at 9-10 (1994) (footnotes omitted).

I would allow a corporation to avoid disclosure if, taking into account its legitimate interests and the legitimate needs of the ESOP Plan participant, there is good cause to maintain confidentiality. *See, e.g.*, S.C. Code §33-16-102(c) (corporation need not permit shareholder to inspect books and records if inspection request is not "made in good faith and for a proper purpose"); Magnuson, *supra*, at 10 (some states "recognize a legitimate corporate interest in protecting certain kinds of material, 'confidential information' useful to

competition for example, from indiscriminate shareholder inspection") & 13 (access may be denied if shareholder demands access out of "idle curiosity," to aid a competitor, or for "a vexatious and hostile purpose"). Disclosure of financial information to its ESOP Plan participants, however, is not necessarily something an employer should fear. *See* Timothy L. O'Brien, *Company Wins Workers' Loyalty by Opening its Books*, Wall St. J., Dec. 20, 1993, at B1 (company's stock price grew from 10 cents to $18.60 in ten years since adoption of open-book policy; sales and employment also grew significantly).

In this case, Lundy has made no concrete showing of any need for secrecy. Some of the material the plaintiffs seek already has been made available to other Lundy shareholders. Shareholder Elton C. Parker, Jr., for example, was provided with Lundy's consolidated financial statements and schedules after requesting them, even though he did not indicate why he wanted the information or for what purposes he intended to use it. Furthermore, the plaintiffs' request was made for a proper purpose, namely, to find out why the assessed value of their ESOP shares fell more than 40 percent in a year when the company was profitable. Thus, I believe the plaintiffs are entitled to the appraisal reports and supporting documentation.

* * *

I respectfully dissent to the extent I have indicated. The majority's narrow construction of § 104(b)(4) cannot be squared with Congress's goal of giving employees maximum power to monitor the security of their pension savings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1275
CA-93-45-3-H

JANICE FAY FAIRCLOTH; EVELYN D. FREDERICK; CALLWEALL W. SMILING

Defendants-Appellants

v.

LUNDY PACKING COMPANY; ANNABELLE L. FETTERMAN, Trustee Lundy Packing Company Stock Ownership Plan; MABEL F. HELD, Trustee Lundy Packing Company Stock Ownership Plan

Defendants-Appellees

and

JOHN DOES

Defendant

AMERICAN ASSOCIATION OF RETIRED PERSONS; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

Amici Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

[FILED August 30, 1996]

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

CASE NUMBER: 93-45-CIV-3-H

JANICE FAY FAIRCLOTH, EVELYN D. FREDERICK, and CALLWEALL W. SMILING

Plaintiffs

v.

THE LUNDY PACKING COMPANY, ANNABELLE L. FETTERMAN, Trustee Lundy Packing Company Stock Ownership Plan, and MABEL F. HELD, Trustee Lundy Packing Company Stock Ownership Plan,

Defendants

JUDGMENT IN A CIVIL CASE

[FILED JAN 20 '95]

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED plaintiff's motion for summary judgment is granted as to any contracts between the Employee Stock Ownership Plan and custodians, investors, or insurers of plan assets.

IT IS FURTHER ORDERED that defendant Lundy Packing Company pay to each plaintiff the sum of $2,500 as a statutory penalty and this case is closed.

THE ABOVE JUDGMENT ENTERED TODAY, January 20, 1995, AND COPIES MAILED TO:

Martha A. Geer
Attorney at Law
PO Box 27927
Raleigh, NC 27611

Susanna K. Gibbons
Attorney at Law
PO Box 10096
Raleigh, NC 27605-0096

January 20, 1995
Date

DAVID W. DANIEL
Clerk

/s/ Delsia Health
(By) Deputy Clerk

CIV OB#47, P-891

I certify the foregoing to be a true and correct copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By /s/ Delsia Health

Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 93-45-CIV-3-H

JANICE FAY FAIRCLOTH, EVELYN D. FREDERICK, and CALLWEALL W. SMILING,

Plaintiffs,

v.

THE LUNDY PACKING COMPANY, ANNABELLE L. FETTERMAN, Trustee Lundy Packing Company Stock Ownership Plan, and MABEL F. HELD, Trustee Lundy Packing Company Stock Ownership Plan,

Defendants.

ORDER

[FILED JAN 20 '95]

This matter is before the court on plaintiffs' motion for summary judgment and defendants' motion for a protective order. The plaintiffs are retired and current employees of the Lundy Packing Company (''Lundy'') who are participants in Lundy's Employees Stock Ownership Plan (''ESOP''). The ESOP is a benefits plan within the meaning of the Employee's Retirement Income Security Act (''ERISA''). They request numerous documents regarding the operation of the plan pursuant to their rights as beneficiaries of a benefits plan subject to ERISA. This matter is ripe for ruling.

STATEMENT OF THE CASE

The facts in this matter have already been set out in detail in this court's order filed on October 12, 1994. In that order, the court granted much of the defendants' motion for summary judgment. Only plaintiffs' claims that defendants

wrongfully failed to deliver copies of contracts between the ESOP and any managers, custodians, or insurers of ESOP funds and plaintiffs' claims for statutory penalties from the plan administrator, Lundy, remain before the court. In the event that this court orders that the defendants disclose any documents to the plaintiffs, the defendants move for a protective order requiring the plaintiffs to hold all such documents in confidence.

Inasmuch as the court has recited the facts of this case in its previous order, only those facts relevant to the remaining claims follow:

1) The plaintiffs became alarmed at a sudden drop in the value of Lundy stock, one of the assets of the ESOP, and sought the aid of the United Food and Commercial Workers Local 204 ("the Union") in determining why Lundy stock, and consequently their ESOP benefits, had lost value.

2) On March 23, 1993, the Union provided the plaintiffs with letters requesting fourteen separate categories of information; the plaintiffs signed and mailed the letters. Among the documents requested were all contracts between the ESOP and any third party.

3) On April 19, 1993, the defendants provided a portion of the requested documents, none of which are relevant to the claims before the court. The defendants also requested clarification for other categories of information, among them the contracts requested by the plaintiffs.

4) On May 27, 1993, plaintiffs filed their complaint.

5) On June 18, 1993, the defendants provided audited financial information and the "Form 5500s," or annual reports, which they were required to provide under ERISA.

DISCUSSION

The plaintiffs' motion for summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure. Under Rule 56, summary judgment may only be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1975). The non-moving party is entitled to the benefit of all inferences which can be drawn from the underlying facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

I. Disclosure of Contracts Between the ESOP and Money Managers

The parties agree that there are no genuine issues of material fact on this issue. Instead, the sole question presented to the court is whether ERISA requires the defendants to provide the requested contracts to the plaintiffs. In the October 12, 1994, order, this court held that "all contracts" were not contracts under which the plan was operated. However, the court also held that contracts between the ESOP and custodians, managers, or insurers of plan assets might be subject to disclosure.

ERISA provides for the disclosure of contracts under which a plan is operated. 29 U.S.C. § 1024(b)(4) (1994). In this court's October 12, 1994, order, the court concluded a lengthy analysis of the relevant statutory language, legislative history, and case law with the observation that the disclosure provision was to be strictly construed under Fourth Circuit precedent. The court relied in part on the case of *Aliff v. BP America, Inc.*, 26 F.3d 486, 490 (4th Cir. 1994). Specifically, the court held that, of the "other" types of documents sought by plaintiffs, only those contracts, instruments, or agreements which either actually established, directed or controlled the operation of a benefits plan must be disclosed.

The court finds that a contract between the ESOP and a manager or custodian of ESOP assets should be disclosed under ERISA. First, the document is a contract, as the statute requires. 29 U.S.C. § 1024(b)(4) (1994). Second, such a contract is one which governs the operation of the plan. Any contract between a custodian or investor of fund assets would determine the conditions under which plan assets are held by a third party and how those assets are to be managed. A custodian or manager of ESOP funds operates the benefit plan on behalf of the plan administrator. Plaintiffs are, therefore, entitled to disclosure of such contracts, if they exist.

There remains the question of any insurance contracts covering plan assets. It is true that insurance contracts do not directly govern the operation of the plan. However, in the event of a loss of plan funds, an insurance contract might provide a significant safety net for the plan beneficiaries. The exact nature and extent of the protection offered by any such contract, if it exists, would be dependent on the wording of the contract. In other words, an insurance contract is so closely intertwined with the general operation of a benefits plan that it can fairly be said to be a contract under which the benefits plan is operated. Accordingly, plaintiffs are entitled to summary judgment on this point as well.

II. Statutory Penalties

Plaintiffs claim that they are entitled to statutory penalties of $100 per day dating from their request for the information. An administrator who does not provide information upon request of a plan participant "within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal." 29 U.S.C. § 1132()c) (1994). Plaintiffs state that the statute has as its chief purpose the punishment of plan administrators who

violate the terms of the statute. Defendants argue that there is no evidence of their bad faith, and that there is no need for the imposition of any sanctions in this matter.

There are two such failures or refusals in the facts at bar. Plaintiffs' initial request for information was mailed on March 23, 1993. On April 19, 1993, the defendants responded, by letter, that the plaintiffs' request was over broad and requested clarification as to certain of plaintiffs' requests. Plaintiffs never responded. On May 25, 1993, the plaintiffs requested additional information from the defendants. On June 18, 1993, the defendants decided that the plaintiffs were entitled to the "Form 5500s" and audited financial information, and provided them to the plaintiffs.

Plaintiffs' initial request for information was mailed on March 23, 1993. With respect to the first violation, the "Form 5500s" and the audited financial information, the defendants concede that plaintiffs were entitled to the information. Defendants realized that fact early in the lawsuit and cured their failure with respect to the "Form 5500s" and audited financial information on June 18, 1993. Given that the defendants had thirty days in which to respond, they are exposed to penalties for the period beginning on April 22, 1993, and concluding on June 18, of the same year. The second failure was defendants' refusal to provide the contracts between the plan and any custodians or managers of plan funds and assets. This failure also began on April 22, 1993, and has not yet been cured.

The penalty statute expressly confers discretionary authority upon this court. At least one factor in the award of statutory penalties is the plaintiff's need for the information which was not furnished. *Glocker v. W.R. Grace & Co.*, 974 F.2d 540 (4th Cir. 1992). Other factors include prejudice to the plaintiffs and the bad faith of the defendants. *Rodriguez-Abreu v. Chase-Manhattan Bank, N.A.*, 986 F.2d 580 (1st Cir. 1993).

It is clear that a plaintiff need not show damages or prejudice in order to merit an award of statutory penalties. *See, e.g., WP v. WP Anesthesia, Inc.*, 20 F.3d 1108, 1111 (10th Cir. 1994); *Godwin v. Sun Life Assurance Corp.*, 980 F.2d 323, 326 (5th Cir. 1992); *Harsh v. Eisenberg*, 956 F.2d 651 (7th Cir. 1992); *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 891 F.2d 842 (11th Cir. 1990). The purpose of the statute is not to compensate a plaintiff for injuries, but rather to punish non-compliance with ERISA requirements. *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1494 (11th Cir. 1993).

With these factors in mind, the court turns to the facts in this case. The first failure to supply information, the "Form 5500s" and the audited financial information, is one which Lundy conceded within two months of their failure. Lundy, through its officers, pleads simple mistake in its initial failure to realize that the "Form 5500s" and audited financial information were required. The second failure, relating to the contracts just discussed by the court, is one which Lundy has never admitted or corrected.

Lundy's failure to provide the annual reports, or "Form 5500s," is the more egregious violation of ERISA. Lundy realized its mistake and corrected it. However, Lundy was under a statutory duty to provide the requested documentation within thirty days. Lundy's sole justification for its failure was its belief that the summary annual reports sufficed. Lundy also points to the lack of prejudice to the plaintiffs and argues that simple untimeliness is not enough to warrant penalties.

The court finds that, at best, Lundy's failure to provide the "Form 5500s" and audited financial information was the product of inexcusable neglect. The "Form 5500s" are the annual reports of the plan, and the statute expressly refers to annual reports as documents subject to disclosure. 29 U.S.C.

§ 1024(b)(4) (1994). Lundy's mistaken belief that the summary annual report would suffice is simply not supported by the plain language of the statute. Lundy's justification is even less compelling in light of the fact that the plaintiffs requested both the annual reports and the summary annual reports.

The plaintiffs provided evidence which they contend demonstrates that the defendants deliberately delayed disclosure of the annual reports until after an election to determine if Lundy's facility would be "unionized." This evidence consists of a communication between Lundy and its counsel, asking, with regard to the plaintiffs' information requests, what Lundy could withhold and how long Lundy could delay in responding. Lundy specifically asked, "Can we wait until after the [union] election?"

The evidence does not establish Lundy's bad faith because as non-movant, Lundy is entitled to have the benefit of all inferences drawn in its favor. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). At best, the statement is ambiguous. Lundy could have, in good faith, inquired of counsel what information it could withhold and how long it had to respond, particularly in light of the scope of the plaintiffs' requests. The fact that Lundy then failed to provide annual reports within the time allotted by statute could be the product of neglect or mistake. In short, the plaintiffs' evidence does not show that Lundy is guilty of bad faith or wrongdoing.

A major purpose of the penalty statute is the punishment of non-compliance with ERISA requirements. *Daughtrey*, 3 F.3d at 1494. Here, the plan administrator failed to comply with an express statutory provision about which there could be little, if any, confusion. Lundy's failure to offer any reasonable justification for its failure mandates that its non-compliance be punished. However, the court is also aware

that Lundy provided extensive information regarding the ESOP to the plaintiffs.

Lundy's second failure to provide information, the contracts between the ESOP and custodians, investors or insurers of fund assets, is less serious. The contracts are not specifically identified, but instead fall into a "catch-all" category of other contracts under which the benefits plan is operated. Lundy's duty to provide the documents was not necessarily clear to it in light of the sparse judicial precedent on this point and the difficulty in applying the statutory test of the "catch-all" category.

Lundy's failure did not work any particular harm or prejudice to the plaintiffs. Lundy provided the plaintiffs a wealth of information regarding the value of its stock and the benefits plan. Lundy personnel conducted meetings regarding the drop in the value of Lundy stock, at least one of which included a presentation by, and question-and-answer session with, the accounting firm which issued the valuation reports. Lundy personnel also extended invitations to ask further questions regarding the benefits plan and the fall in Lundy stock value at the convenience of the plan beneficiaries.

Lundy's continued attempts to give plan beneficiaries the information they desired, without compromising the company's confidential information, is suggestive of good faith. The plaintiffs, however, argue that the defendants acted in bad faith. They state that Lundy gave extensive information out to persons not parties to this lawsuit, and that Lundy only treated them differently because of union involvement in the suit.

The court has thoroughly reviewed the evidence before it. Nowhere in the materials submitted to the court do Lundy officers actually admit that they treated these plaintiffs differently because they were involved with a union attempting

to organize a Lundy facility. The key fact which appears to have given Lundy officers cause for concern was their perception, apparently from their first requests, that legal action was contemplated by the plaintiffs. Upon the institution of this suit, Lundy began to restrict the information which it provided to all ESOP beneficiaries, excepting only that information specifically required by ERISA. This fact lends further credence to Lundy's assertion that it did not act in bad faith.

There are other factors which offer justification for Lundy's failure to supply the requested contracts. The contracts were but one part of plaintiffs' requests. Many of those requests were for information which the plaintiffs were simply not entitled to under any interpretation of ERISA, ranging from extensive financial information about Lundy's affairs to the tax qualification of the benefits plan. In fact, plaintiffs requested *all* contracts between the benefits plan and any third party. This request clearly exceeded the scope of information to which plan participants were entitled. However, the defendants failed to respond to Lundy personnel's request for clarification of the plaintiffs' request. Plaintiffs attempt to characterize their request as "clear," and therefore argue that clarification was unnecessary. While plaintiffs' request may have been clear, it was also excessive and over broad. Lundy was within its rights to attempt to narrow the scope of the request.

In summary, the court finds that the factors involved in this case mitigate Lundy's failures to disclose. The plaintiffs have provided no evidence of bad faith by Lundy, nor have they demonstrated any harm caused by the failures to disclose. Lundy provided all ESOP participants with extensive access to information regarding the ESOP and the valuation of Lundy stock. The plaintiffs, on the other hand, made a clearly excessive request for information and refused to clarify or limit their requests. Finally, in light of the sparse

judicial precedent on the issue of contracts between a benefits plan and third parties, Lundy's actions were not completely unreasonable. For all these reasons, statutory penalties, while appropriate, should be limited in amount. The court finds that statutory penalties in the amount of $2,500 to be paid to each plaintiff are appropriate.

III. Defendants' Motion for a Protective Order

Defendants move for a protective order with respect to the disclosure of any and all documents covered by the plaintiffs' request. As the defendants candidly concede, there is no authorization under ERISA for a protective order of the type they seek. They rely on the general proposition that, in labor disputes involving a collective bargaining unit, disclosure to union members in an alternate form might be appropriate in order to protect other parties. *See Bauman v. Bish*, 571 F.Supp. 1054 (N.D. W.Va. 1983).

For three separate reasons, this principle has little applicability to the facts of this case. First of all, the order sought by the defendants is typically employed in labor, rather than ERISA disputes. The remedy they seek flows from the unique policies implicit in labor law. Second, the enforceability of such an order is dependent upon the available sanctions. The union, the entity which Lundy fears will obtain the information, is not a party to this action and hence cannot be bound by any orders in this case. Finally, the courts which limited disclosure did not issue protective order. Instead, they altered the form of the information disclosed, such as the disclosure of aggregate information. *Detroit Edison Co. v. Nat'l Labor Relations Bd.*, 440 U.S. 301 (1979).

The court notes that the defendants have made no showing that the information contained in the contracts between it and custodians, investors, or insurers of ESOP funds are in any

way the subject of a reasonable concern for secrecy. This fact alone weakens their argument. In addition, as the case of *Detroit Edison* makes clear, it would be difficult to enforce such an order. Finally, altering the form of the contracts appears to be impracticable. For all these reasons, the defendants are not entitled to the protective order they request.

CONCLUSION

In conclusion, plaintiffs' motion for summary judgment is GRANTED as to any contracts between the Employee Stock Ownership Plan and custodians, investors, or insurers of plan assets. The court hereby ORDERS that defendant Lundy Packing Company pay to each plaintiff the sum of $2,500 as a statutory penalty for its failure to supply the requested information within thirty days of plaintiffs' request. Defendants' motion for a protective order is DENIED. The clerk is directed to close this case.

This the 20th day of January, 1995.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

At Greenville, N.C.
#16

I certify the foregoing to be a true and correct copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By /s/ Delsia Health

Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 93-45-CIV-3-H

JANICE FAY FAIRCLOTH, EVELYN D. FREDERICK, and CALLWEALL W. SMILING,

Plaintiffs,

v.

THE LUNDY PACKING COMPANY, ANNABELLE L. FETTERMAN, Trustee Lundy Packing Company Stock Ownership Plan, and MABEL F. HELD, Trustee Lundy Packing Company Stock Ownership Plan,

Defendants.

ORDER

[FILED OCT 12 '94]

This matter is before the court on defendants' motion for summary judgment or, in the alternative, a protective order; plaintiffs' motion for an extension of time; and defendants' appeal from an order compelling the production of documents. This case arose out of a dispute over the plaintiffs' request for information pertaining to an ERISA-qualified employee benefits plan furnished by the defendant company to the plaintiffs. The parties have fully briefed all issues before the court, and these matters are ripe for disposition.

STATEMENT OF THE CASE

Plaintiffs are current or retired employees of the Lundy Packing Company ("Lundy") entitled to participate in, and receive benefits under, Lundy's Employee Stock Ownership Plan ("ESOP"). Lundy is the plan administrator as that term is defined in ERISA, and defendants Mabel F. Held

("Held") and Annabelle L. Fetterman ("Fetterman") are plan trustees. Membership in the ESOP is voluntary and available to employees who have worked for Lundy for more than one year. The ESOP is completely funded by contributions from Lundy, and no contributions from other sources are permitted by the trust agreement. Members become eligible for benefits upon disability or retirement, and benefits are paid in the form of whole shares of Lundy stock.

Lundy provided yearly reports to ESOP members which reported, among other things, the value of Lundy shares. Plaintiffs allege that between June 29, 1991, and July 4, 1992, the value of their benefits under the plan decreased significantly in value. The triggering event for the diminution in ESOP benefits was a decrease in the value of Lundy stock. Plaintiffs were alarmed at the reduction in value of the stock and turned to United Food and Commercial Workers Local 204 ("the Union") for assistance in determining what had happened. The Union provided plaintiffs identical letters dated March 23, 1993, requesting fourteen categories of documents which plaintiffs contend relate to the operation of the ESOP. Plaintiffs signed, and the Union mailed, the letters to defendants.

Defendants responded to the plaintiffs' requests by letter dated April 19, 1993. Defendants stated that the plaintiffs' request for plan documents was over-broad, and refused to provide some of the requested information. Defendants also asked for clarification as to the meaning and scope of certain of plaintiffs' other requests. Defendants did, however, provide the Plan Document, Trust Agreement, Summary Plan Description, and the last three Summary Annual Reports. By letter dated June 18, 1993, defendants informed plaintiffs that they were also entitled to the requested audited financial reports and the Form 5500s, and provided them to the plaintiffs.

Plaintiffs never responded to the defendants' request for clarification. In a letter dated May 25, 1993, plaintiffs requested additional information which they claimed related to the ESOP, specifically copies of all stock valuation or appraisal reports of Lundy stock. Plaintiffs further requested all financial information regarding Lundy supplied to the person or entity which prepared each valuation report. Defendants refused to provide this information in a letter dated June 18, 1993.

Plaintiffs filed their complaint on May 27, 1993, before they made their second request for information. The complaint specifies what documents the plaintiffs have refused to provide, and which are the subject of this lawsuit, as follows:

(1) contracts between the ESOP and any third party, including insurance contracts and contracts with custodians of ESOP assets;

(2) any policies adopted by the fiduciaries of the ESOP, including investment policies, trustee expense policies, cost sharing policies, and funding policies;

(3) any insurance policies or bonding policies covering the ESOP or its fiduciaries;

(4) minutes of any meetings regarding the ESOP during the last three years; and

(5) the last Internal Revenue Service determination of tax qualification for the Plan.

Plaintiffs further allege that the defendants failed to provide the Form 5500s and audited financial reports in a timely manner. In their amended complaint, plaintiffs also assert that they are entitled to the stock valuation reports and the underlying financial information used to create those valuation reports.

Plaintiffs contend that defendants' conduct violates the disclosure provisions of the Employee Retirement Security Act ("ERISA"), 29 U.S.C. § 1024(b)(4); breaches the duties of a fiduciary in administering the ESOP for the exclusive benefit of the plan participants in violation of ERISA, 29 U.S.C. § 1024(a)(1); and fails to conform to the plan documents and instruments in violation of ERISA, 29 U.S.C. § 1104(a)(1)(D). Plaintiffs request that the court grant them the statutory penalty of $100 per day beginning on April 19, 1993, an order requiring the defendants to provide the requested information, removal of the defendants as fiduciaries of the plan, monetary damages, and attorney's fees and costs. Defendants argue that the plaintiffs' requests for information are over-broad, and that plaintiffs are not entitled to the statutory penalties provided by ERISA.

DISCUSSION

I. PLAINTIFFS' NOTION FOR EXTENSION OF TIME

In a motion filed September 2, 1994, plaintiffs moved for an extension of time in which to file their reply to defendants' "Consolidated Response and Reply" to plaintiffs' motion for summary judgment. The court had previously granted leave to defendants to file their response to plaintiffs' motion for summary judgment and their reply to their own motion for summary judgment in a single document. As grounds for their motion, plaintiffs state that they have appealed an order of United States Magistrate Judge Wallace W. Dixon granting plaintiffs' motion to compel the production of documents. Plaintiffs seek to delay their response time until ten days following their receipt of the contested documents upon the resolution of defendants' appeal of the Magistrate Judge's order. Defendants do not oppose plaintiffs' motion. Accordingly, the court will grant the motion.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Although the court will grant plaintiffs' motion for an extension of time as to plaintiffs' motion for summary judgment, defendants' motion for summary judgment has been fully briefed and is ripe for disposition. Having submitted their response to the defendants' motion for summary judgment, plaintiffs have no further opportunity to be heard on defendants' motion. Accordingly, the court will rule on defendants' motion for summary judgment.

Defendants' motion for summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure. Summary judgment may be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The inferences to be drawn from the underlying facts are to be viewed in the light most favorable to the non-moving party, here the plaintiffs. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). This court may not resolve factual disputes, nor weigh the evidence presented. *Id.*

The basic facts are not in dispute; the question to be determined in this matter at this stage of the proceedings is the legal question of which of the documents requested by plaintiffs must be disclosed by defendants. Those documents are (1) contracts between the ESOP and any third party, (2) any policies adopted by the fiduciaries of the ESOP, (3) any insurance policies or bonding policies covering the ESOP or its fiduciaries; (4) minutes of any meetings regarding the ESOP during the last three years; (5) the last Internal Revenue Service determination of tax qualification for the Plan; (6) Lundy stock appraisal and valuation reports; and (7) the financial information provided to the entity which prepared any and all stock valuation reports.

A. ERISA-Mandated Disclosure Under § 1024(b)(4)

Plaintiffs claim they are entitled to the documents pursuant to 29 U.S.C. § 1024(b)(4). That statute provides that "[t]he administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract or other instruments under which the plan is established or operated." The disclosure provision is found within a subsection captioned "Publication of summary plan description and annual report to participants and beneficiaries of the plan." The caption suggests that the information available upon request is similar in nature and scope to the reporting provisions found in the same subsection of the statute.

ERISA's disclosure-upon-request provision is one part of an extensive mandatory reporting and publication scheme. Those statutes require the dissemination of, among other things, annual reports, summary plan descriptions, plan descriptions, and actuarial reports to both the federal government and to benefits plan participants or beneficiaries. 29 U.S.C. § 1024 (1994). There is, therefore, considerable information available to plan participants even in the absence of a request for information. Far from being the sole source of any and all information relating to a benefits plan, the disclosure provision is better considered a supplement to the mandatory disclosures and reports already required by the statute.

The legislative history of the statute sheds additional light on the construction of the disclosure provision. ERISA's disclosure and reporting provisions were designed to increase the amount of information available to the employee-beneficiary, "so that the individual participant knows exactly where he stands with respect to the plan—what benefits he

may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted." H.R. Rep. No. 533, 93rd Cong., 2nd Sess. 1974, *reprinted in* 1974 U.S.C.C.A.N. 4639. The Congressional Report suggests that expansive disclosure and reporting are required. The legislative history, however, refers to the reporting and disclosure provisions in their entirety.

Judicial interpretation of § 1024(b)(4) is sparse and does not clearly illuminate the meaning of the statute. Among the documents previously held to be covered by this section are charts essential to the calculation of benefits, *Lee v. Dayton Power and Light Co.*, 604 F.Supp. 987 (S.D.Oh. 1985), and actuarial reports which must be supplied to the Department of Labor, *Bartling v. Fruehauf Corp.*, 29 F.3d 1062 (6th Cir. 1994), *amended*, 1994 Fed App. 334 (6th Cir. 1994). Documents not subject to disclosure upon request include minutes of trustee meetings, *Chambless v. Masters, Mates & Pilots Pension*, 571 F.Supp. 1430 (S.D.N.Y. 1983); and stock appraisal reports in an ESOP, *Foltz v. U.S. News & World Report*, 663 F.Supp 1494 (D.D.C. 1987). These decisions turn on factors such as whether the requested document provides guidance to the plan administrators as to the type or amount of benefits to be paid and whether the document was necessary to the operation of the benefits plan.

The sole ERISA disclosure case in the Fourth Circuit directs this court to strictly construe the disclosure provision. In *Aliff v. BP America, Inc.*, 826 F.Supp. 178, 188 (S.D.W.Va. 1992), one company acquired a subsidiary of another; as part of the sale, the selling company provided a benefits package. Employees would be eligible for benefits under the severance plan if their new level of compensation with the acquiring company, including benefits, was not at

an equivalent level of compensation with the selling company. Equivalency was determined by the plan administrator using an actuarial report comparing the two companies' benefits plans. The plaintiffs discovered that they received fewer benefits with the acquiring company than they had received with the selling company. This situation occurred because the actuarial report determined the equivalence of the benefits plans as to the aggregate employees, rather than individual employees. *Id.*

The district court held that the actuarial report used to determine eligibility for benefits could not be obtained by plan participants. The district court explained that § 1024(b)(4) "does not require the plan administrator to supply a copy of the pertinent actuarial report. The Court also notes that Plaintiffs were provided with a copy of the ISP, the document 'under which the [severance] plan . . . [was] established or operated.' Plaintiffs therefore have no cause of action." *Id.* at 188. The Court of Appeals affirmed without comment. *Aliff v. BP America, Inc.*, 26 F.3d 486, 490 (4th Cir. 1994).

The Fourth Circuit's affirmation of the district court's decision in *Aliff* is in direct conflict with that of the Sixth Circuit in *Bartling*. In *Bartling*, the Sixth Circuit held that because the actuarial report was required, by statute, to be filed with the government, that it was "necessary" to the operation of the plan. *Bartling*, 29 F.3d at 1070. Therefore, the Sixth Circuit concluded, the actuarial report was an instrument under which the plan was operated. The actuarial report considered by the Fourth Circuit in *Aliff* was not an annual actuarial report of the plan filed with the government. This fact does not, however, distinguish the two cases. The *Aliff* actuarial report was necessary to determine whether the employees were eligible for benefits under the severance plan. The actuarial report was necessary to the operation of the plan. Under a liberal construction of §

1024(b)(4), as the Sixth Circuit adopted in *Bartling*, disclosure of the actuarial report would be required. The Fourth Circuit's decision, therefore, embodies a different interpretation of ERISA.

What was significant to the district court, and to the Fourth Circuit as well, was that the actual severance plan document, considered by the court to be the document under which the plan was established and operated, was disclosed. The court finds that *Aliff*—the controlling precedent in this circuit—requires the disclosure only of those documents which may fairly be labelled as instruments, contracts, trust agreements or other documents identified by the statute, and which, in a legally operative manner, either establish or provide direction for the operation of the plan. Merely necessary documents are not subject to disclosure; only the legally controlling documents are subject to disclosure. This strict construction of the statute is mandated in the Fourth Circuit by *Aliff v. BP America, Inc.*, 26 F.3d 490 (4th Cir. 1994).

The first category of documents requested by plaintiffs is all contracts between the ESOP and any third party. Some of these contracts will tell the employee who has custody of his benefits. These contracts, moreover, if between a custodian of assets or an investment manager and the ESOP, are contracts under which the ESOP is operated. However, plaintiffs apparently believe they are entitled to each contract between the ESOP and any third party, and not just those which govern the operation of the plan. Two specific types of contracts were identified in the request: those with custodians or investment managers of ESOP assets and insurance contracts. The court finds that contracts with custodians or managers of ESOP assets which concern the custody or investment of those assets are not clearly documents which should not be furnished to the plaintiffs. Insurance contracts between such a custodian and the ESOP which might pro-

vide for replacement of the assets, if they exist, might also be subject to disclosure to the plaintiffs. The court concludes that any other contracts are likely be beyond the scope of 29 U.S.C. § 1024(b)(4). Should plaintiffs wish to compel disclosure of additional contracts, they must meet their burden of proof and convince the court that the requested contracts are, in fact, those under which the plan is operated or established. For that reason, defendants are entitled to judgment as a matter of law as to plaintiff's request for all contracts between the ESOP, except those between the ESOP and custodians, managers, or insurers of plan assets.

The second category of documents requested by plaintiffs are policies adopted by the fiduciaries of the ESOP. Any such "policies" adopted by the fiduciaries are neither contracts nor instruments. Had Congress intended any document controlling the administration of the plan to be furnished, it would have employed less restrictive terms in the statute. Furthermore, any "policies" adopted by the fiduciaries would be secondary in effect; no "policy adopted by the fiduciaries could override the legally controlling trust agreement and plan document. Therefore, any of the requested "policies" would not be instruments under which the plan is operated. Finally, plaintiffs' request is ambiguous; the court is not certain exactly what information the plaintiffs seek, or even if the information exists. Plaintiffs never responded to defendants' request for clarification, nor have they significantly amplified their request before this court. For these reasons, plaintiff's request for "policies adopted by the fiduciaries" must be denied.

The third category of information sought by the plaintiffs is insurance or bonding policies covering the ESOP or its fiduciaries. Plan officials must be covered by a bonding contract. 29 U.S.C. § 1112 (1994). The bonding contract, though necessary to the plan, is not concerned with the actual operation of the plan. Under the rule of *Aliff*, the

bonding policy and similar contracts or documents need not be disclosed. Defendants are, therefore, entitled to judgment as a matter of law.

The fourth category of information sought by the plaintiffs is minutes from trustee meetings regarding the operation of the ESOP. "Neither ERISA nor the federal regulations issued thereunder make any mention of any requirement that plan participants be allowed to see the minutes of trustees' meetings or prior decisions by the trustees." *Chambless v. Masters, Mates & Pilots Pension*, 571 F.Supp. 1430 (S.D.N.Y. 1983). The *Chambless* holding is consistent with this court's analysis of the request for the fiduciaries' policies; minutes of trustee's meetings are neither instruments nor contracts. In addition, minutes of meetings have no legally operative effect, and in any event may not change or affect the trust agreement and plan document. Defendants need not furnish any minutes of any meetings to the defendants.

The fifth piece of information sought by the plaintiffs is the last Internal Revenue Service determination of tax qualification for the plan. This information wholly fails to qualify as an instrument under which the plan is operated or established. Accordingly, defendants need not furnish the tax qualification information.

Finally, plaintiffs seek all stock appraisal or valuation reports, as well as all of the financial information used to create those reports. Such information is clearly neither an instrument nor a contract under which the plan is established or operated. Stock valuation reports have no operative effect; they merely attempt to determine the value of stock. The underlying financial information bears even less relationship to an instrument or contract. Another federal court confronted with an employee attempt to gain information regarding the value of shares held by an ESOP has also held

that ERISA does not authorize the release of valuation reports. *Foltz v. U.S. News & World Report, Inc.*, 663 F.Supp. 1494, 1536 (D.D.C. 1987). For that reason, plaintiffs are not entitled to the stock appraisals or the underlying financial information they week.

B. Disclosure Required By the Plan Documents

Plaintiffs also assert that the plan documents require the defendants to make the requested disclosures. Defendants' failure to disclose, plaintiffs allege, violates the provision of ERISA which requires the fiduciaries to discharge their duties in accordance with plan documents. 29 U.S.C. § 1104(a)(1)(D) (1994). Plaintiffs rely on the Summary Plan Description's explanation of their ERISA rights for the proposition that they are entitled to all of the information they have requested.

The Summary Plan Description section relied on by plaintiffs is captioned "ERISA RIGHTS;" in section 16(b), the Summary Plan Description states that an ESOP participants may obtain "copies of all Plan Documents and other Plan Information." While the quoted language lends credence to plaintiffs' arguments, it must be read in light of the remainder of the section. In the introduction, the Summary Plan Description clearly states that "ERISA provides that all plan members shall be entitled to" the enumerated rights. In other words, the Summary Plan Description states that the rights to obtain information flow from ERISA, and not the Summary Plan Description itself. For the reasons already discussed, the statute does not entitle plaintiffs to the broad disclosure they seek, nor can plaintiffs' claim based on the Summary Plan Description succeed.

C. Breach of Fiduciary Duties Imposed by 29 U.S.C. § 1104(a)(1)

Plaintiffs' third and final claim for relief depends on the fiduciary duties imposed by statute. Fiduciaries of the ESOP, such as Held and Fetterman, must by law discharge their duties "solely in the interest of the participants and beneficiaries" and for the exclusive purpose of providing benefits to the participants. 29 U.S.C. § 1104(a) (1994). The statute further requires the use of the care and skill of a prudent person acting in a similar capacity, the conduct of the plan in accordance with the plan documents, and diversification of investments so as to minimize the risk of large losses. *Id.*

Plaintiffs' argument that this provision requires some additional disclosure of information is without merit. ERISA explicitly provides for disclosure of plan contracts and instruments in 29 U.S.C. § 1024(b)(4). The fiduciary duties imposed by the statute require plan administrators and trustees to act "for the *exclusive* purpose of providing benefits to participants . . . and defraying . . . expenses." 29 U.S.C. § 1104(a)(1)(A) (emphasis added). The fiduciary duties provision makes no mention of providing information, nor would providing information bear any relationship to providing benefits or defraying costs. Furthermore, the provision does not expand any rights of inspection of documents beyond the contractual rights of parties. *Central States, Southeast, Etc. v. CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981). Accordingly, this court finds that 29 U.S.C. § 1104(a)(1)(A) does not expand the disclosure provisions of ERISA. Defendants are entitled to summary judgment as a matter of law as to plaintiffs' claim pursuant to 29 U.S.C. § 1104(a)(1).

D. Liability of Plan Administrators Pursuant to 29 U.S.C. § 1132(c)(1)

Defendants make an additional argument in support of their motion for summary judgment with respect to statutory penalties under ERISA. The civil enforcement provisions of the statute impose civil penalties for failure to make requested disclosures upon the plan administrator of up to $100 per day from the date of the violation. Defendants contend that Held and Fetterman, as trustees and fiduciaries, are not within the ambit of the statute. Defendants also contend that the plaintiffs must establish bad faith in order to recover statutory penalties.

A plan administrator is the person so designated in the trust agreement or other instrument creating the plan. 29 U.S.C. § 1002(16)(A) (1994). In this case, the plan administrator is Lundy. A literal reading of the statute would require that only Lundy be liable should the court eventually award any statutory penalties. The language of the statute is controlling, and only a plan administrator may be required to pay civil penalties. *Moran v. Aetna Life Ins. Co.* 872 F.2d 296 (9th Cir. 1989); *see also Vanderklok v. Provident Life and Accident Ins. Co.*, 956 F.2d 610 (6th Cir. 1992). In addition, in 1989, the statute was amended to specifically provide for civil suit against fiduciaries. 29 U.S.C. § 1132(1) (1994). However, the statute authorizes the Secretary of Labor to bring an action against a fiduciary for penalties. The statute does not expressly create a cause of action for plan beneficiaries. 29 U.S.C. § 1132(a)(6) (1994). For these reasons, defendants Held and Fetterman are entitled to judgment as a matter of law as to all claims against them for penalties.

III. DEFENDANTS' APPEAL OF THE MAGISTRATE JUDGE'S ORDER COMPELLING THE PRODUCTION OF DOCUMENTS

Defendants appeal an order granting plaintiffs' motion to compel the production of documents. The order granting the motion to compel was entered by United States Magistrate Judge Wallace W. Dixon, filed July 27, 1994. The Magistrate Judge held that, because litigation was imminent, it was not necessary to decide whether the attorney-client privilege applied. Instead, the Magistrate Judge evaluated the discovery dispute using the work-product doctrine. The work-product doctrine shielded all but five of the documents which plaintiffs sought to discover.

Defendants limit their appeal to three of the five documents. They claim that the attorney-client privilege shields these three documents. Plaintiffs argue that the privilege is not applicable where an ERISA trustee seeks legal advice regarding plan administration in her capacity as a fiduciary. Because the three plan documents are not protected by the work-product doctrine, the court must determine whether the attorney-client privilege applies instead.

Two federal courts of appeals have held that an ERISA fiduciary cannot assert the attorney client privilege against plan beneficiaries. *Wildbur v. ARCO Chemical Co.*, 974 F.2d 631, 646 (5th Cir. 1992); *United States v. Evans*, 796 F.2d 274 (9th Cir. 1986). This is because the trustee or fiduciary, as the representative of the plan beneficiaries, is not the real client; rather, the clients are the plan beneficiaries.

The rule permitting disclosure of otherwise privileged information is not, however, without limits. In *Wildbur*, the attorney-client privilege was applicable to communications between the ERISA plan's trial counsel and the plan admin-

istrator on the grounds that (1) "there had never been a mutuality of interest that would create a fiduciary relationship" between the defendant plan administrator and the plaintiff plan beneficiaries and that the communications between the attorney and the plan administrator did not deal with plan administration. *Id.* at 645. As to defendant's in-house counsel, the district court found that the interests of the litigants diverged sufficiently upon the filing of plaintiff's suit to allow the assertion of the privilege as to communications after the filing of the suit. *Id.* The Court of Appeals expressed no opinion on this argument because the work-product doctrine shielded all the documents from discovery.

The court finds that the attorney-client privilege is not applicable to the documents which defendants seek to withhold from plaintiffs. First, the requested communications all date from a period prior to the filing of the lawsuit. Therefore, the exception, if it exists, for non-trial counsel's advice to ERISA plan administrators is not applicable here. Also, because defendants' counsel consulted with defendants during a period when there was a mutuality of interests, before the filing of the lawsuit, and because the communications concerned the administration of the plan, the attorney-client privilege available to trial counsel is not applicable in this instance. Accordingly, the order granting plaintiff's motion to compel must be affirmed.

IV. DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

In the alternative to their motion for summary judgment, defendants request that this court issue a protective order to preserve the confidentiality of any information which the court orders to be disclosed to the plaintiffs. Inasmuch as the court will grant summary judgment for the defendant on most of plaintiffs' requests for further information, there is no need of a protective order as to those elements of plain-

tiffs' claims. Remaining before the court, however, is plaintiffs' request for contracts between the ESOP and managers, custodians, or insurers of ESOP assets. The court has not yet granted plaintiffs' motion for summary judgment because it is not yet ripe. Accordingly, the court reserves ruling on defendants' motion for a protective order until such time as an order requiring disclosure is issued.

CONCLUSION

For the aforementioned reasons, defendants' motion for summary judgment is GRANTED as to plaintiffs' request for all information sought pursuant to 29 U.S.C. § 1024 (b)(4), with the exception of plaintiffs' requests for contracts between the ESOP and asset managers, custodians, or insurers; GRANTED as to plaintiffs' claims that the Summary Plan Description, through 29 U.S.C. § 1104(a)(1)(D), requires disclosure of the requested information; GRANTED as to plaintiffs' claims for breach of fiduciary duty pursuant to 29 U.S.C. § 1104(a)(1); and, GRANTED as to plaintiffs' claims for statutory penalties from defendants Held and Fetterman. After careful review, the order of Magistrate Judge Dixon granting plaintiffs' motion to compel is AFFIRMED. Plaintiffs' motion for an extension of time is GRANTED. Defendants are directed to file the documents with the clerk of court, and plaintiffs shall have ten days from the date of said filing in which to file their reply to defendants' response to plaintiffs' motion for summary judgment. Remaining before the court are plaintiffs' motion for summary judgment as to plaintiffs' request for contracts between the ESOP and any managers, custodians, or insurers of ESOP funds and defendants' motion for a protective order.

This the 7th day of October, 1994.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
#16

I certify the foregoing to be a true and correct copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By /s/ Margaret W. (illegible)
Deputy Clerk

APPENDIX F

STATUTORY APPENDIX

ERISA Section 3(3):

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

ERISA Section 3(16):

(16) (A) The term "administrator" means--

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means

(i) the employer in the case of an employee benefit plan established or maintained by a single employer,

(ii) the employee organization in the case of a plan established or maintained by an employee organization, or

(iii) in the case of a plan established or maintained by two or more employers or jointly by one

or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

ERISA Section 3(21)

(21) (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent

(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

(ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or

(iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. s 80a-1 et seq.], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal

underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

ERISA Section 402(a)

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

ERISA Section 412(a)

(a) Requisite bonding of plan officials

Every fiduciary of an employee benefit plan and every person who handles funds or other property of such a

plan (hereafter in this section referred to as "plan official") shall be bonded as provided in this section; except that--

(1) where such plan is one under which the only assets from which benefits are paid are the general assets of a union or of an employer, the administrator, officers, and employees of such plan shall be exempt from the bonding requirements of this section, and

(2) no bond shall be required of a fiduciary (or of any director, officer, or employee of such fiduciary) if such fiduciary--

(A) is a corporation organized and doing business under the laws of the United States or of any State;

(B) is authorized under such laws to exercise trust powers or to conduct an insurance business;

(C) is subject to supervision or examination by Federal or State authority; and

(D) has at all times a combined capital and surplus in excess of such a minimum amount as may be established by regulations issued by the Secretary, which amount shall be at least $1,000,000. Paragraph (2) shall apply to a bank or other financial institution which is authorized to exercise trust powers and the deposits of which are not insured by the Federal Deposit Insurance Corporation, only if such bank or institution meets bonding or similar requirements under State law which the Secretary determines are at least

equivalent to those imposed on banks by Federal law.

The amount of such bond shall be fixed at the beginning of each fiscal year of the plan. Such amount shall be not less than 10 per centum of the amount of funds handled. In no case shall such bond be less than $1,000 nor more than $500,000, except that the Secretary, after due notice and opportunity for hearing to all interested parties, and after consideration of the record, may prescribe an amount in excess of $500,000, subject to the 10 per centum limitation of the preceding sentence. For purposes of fixing the amount of such bond, the amount of funds handled shall be determined by the funds handled by the person, group, or class to be covered by such bond and by their predecessor or predecessors, if any, during the preceding reporting year, or if the plan has no preceding reporting year, the amount of funds to be handled during the current reporting year by such person, group, or class, estimated as provided in regulations of the Secretary. Such bond shall provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of the plan official, directly or through connivance with others. Any bond shall have as surety thereon a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to sections 9304-9308 of Title 31. Any bond shall be in a form or of a type approved by the Secretary, including individual bonds or schedule of blanket forms of bonds which cover a group or class.

ERISA Section 502(c)(1)

(C) Refusal to supply requested information; failure to comply with notice requirements; penalties

(1) Any administrator

(A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or

(B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

ERISA Section 502(e)(1)

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

Supreme Court, U.S.
FILED
DEC 5 1996
CLERK

No. 96-702

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

Janice Fay Faircloth, Evelyn D. Frederick,
Callweall W. Smiling,

Petitioners,

v.

THE LUNDY PACKING COMPANY,
ANNABELLE L. FETTERMAN, MABEL F. HELD,
TRUSTEES LUNDY PACKING COMPANY
STOCK OWNERSHIP PLAN, AND JOHN DOES,

Respondents,

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 5, 1996

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Brief In Opposition to Petition
For Writ of Certiorari

The Lundy Packing Company, Annabelle L. Fetterman and Mabel F. Held (Respondents) respectfully request that this Court deny the Petition For Writ of Certiorari filed by Callweall W. Smiling, Evelyn D. Frederick and Janice Fay Faircloth (Petitioners).

The Petition should be denied because (1) there is no actual conflict between the circuits on the Question Presented; (2) the Fourth Circuit's decision is correct and consistent with this Court's discussion of ERISA's notice and disclosure requirements in *Curtiss-Wright Corp. v. Schoonejongen*, 1555 S.Ct. 1223(1995), and (3) contrary to the suggestion in the Question Presented, it is undisputed that Petitioners received numerous "basic plan documents" describing the value of their benefits and confirming that the ESOP had received a tax determination letter and was bonded.

I. Statement of the Case

The Lundy Packing Company (Lundy) is a closely held corporation that produces and sells pork products.[1] It established the Lundy Packing Company Employee Stock Ownership Plan and Trust (the ESOP) in 1976. Employees are eligible to participate after one year of employment, and receive benefits upon the occurrence of defined events, such as disability or retirement. Lundy is the Plan Administrator of the ESOP.

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[1]In accordance with Rule 29.6, The Lundy Packing Company has no parent company. It has an ownership interest in L & H Farms, L.L.C. .

The ESOP is funded entirely by contributions from Lundy. In 1992, approximately two thirds of the assets of the ESOP were invested in Lundy stock. The stock, which is not publicly traded, is valued by an independent appraiser each year. The independent appraiser furnishes a report which shows the analysis used to arrive at the fair market value of the stock. The report contains confidential information about Lundy, including number of shares outstanding, shareholder's equity, book value per share and earnings per share.

The fair market value determined by the independent appraiser is communicated to participants at the annual employee meeting. At that meeting, each participant receives a statement showing the value assigned to Lundy stock by the independent appraiser for the current and previous year, as well as the value of Lundy stock and other assets in their ESOP account.[2]

The stock valuation for 1992, prepared by InterState Johnson Lane, reflected a sharp decline in the value of Lundy stock. This decline was because Lundy's profits were low. The stock value decline, the reasons for the decline, and the impact of the stock value on ESOP

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[2]Petitioners erroneously describe the situation in 1992 when they state that they "received statements from Lundy indicating that the value of their benefits under [the ESOP] had dropped 42% from June 29, 1991 to July 4, 1992." In fact, the Lundy stock dropped 42% in value, but petitioners' benefits dropped by only 28% because only about two thirds of the ESOP assets were invested in Lundy stock. In addition, petitioners are wrong when they state that "the reason for the precipitous decline in the value of their account was because Respondent had valued Lundy stock at only 58% of the value assigned in the prior plan year." In fact, each participant, including petitioners, received a statement of account from Lundy showing that the decline was due to the independent appraiser's reduced valuation.

accounts were explained in the annual meeting, and at numerous "question and answer" meetings arranged by Lundy. Although Petitioners attended these meetings, they asked no questions about the ESOP, the stock valuation, or any of the numerous other documents which they seek in this lawsuit.

The ESOP did not sell or purchase Lundy stock in any transactions with Lundy, plan fiduciaries, majority stockholders or other parties in interest during the 1991-92 Plan Year, or for many years prior to then.

By letters to the Plan Administrator, Petitioners requested fifteen categories of documents, pursuant to Section 104(b)(4) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1024(b)(4). Petitioners did not ask any substantive questions about the ESOP, the stock value or their benefits, but merely itemized documents they wanted. In response, Lundy provided the following documents: the Plan, the Trust Agreement, the Summary Plan Description, the last three Summary Annual Reports, and the last three Annual Reports, including financial statements for the ESOP.

Petitioners ask this Court to overturn the Fourth Circuit's decision that on the facts of this case, ERISA does not compel plan administrators to provide participants with four categories of documents upon request: (1) the IRS letter confirming that the ESOP documents conform to the requirements of Internal Revenue Code; (2) the bonding policy insuring the ESOP; (3) a stock valuation report from the independent appraiser and (4) corporate financial statements and other data furnished to the independent appraiser.

Section 104(b)(4) requires the Plan Administrator to furnish, upon the written request of a participant, "the latest updated summary plan description, plan description, and the latest annual report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." The documents Petitioners seek are not specifically identified in the statute, and come within its purview, if at all, only if they are "other instruments under which the Plan is established or operated." The Fourth Circuit correctly interpreted this phrase as encompassing "formal or legal documents under which a plan is set up or managed". *Faircloth v. The Lundy Packing Company,* 91 F.3d 648, 654 (4th Cir. 1996).

II. Reasons For Denying the Petition

Although the Question Presented suggests that the Fourth Circuit ignored settled precedent, denying Petitioners access to "basic plan documents" and important information about their benefits, the record and decision below conclusively demonstrate that no such miscarriage of justice occurred. ERISA Section 104(b)(4) specifically requires disclosure of basic plan documents such as the Plan and the Annual Report filed with the Department of Labor. Lundy gave Petitioners the documents specifically identified in Section 104(b)(4), and those documents contained specific information about the value of benefits, the tax-qualified status of the ESOP and that the fiduciaries were bonded.

Petitioners ask the Court to create an amorphous and impractical standard which would require Plan Administrators to furnish virtually every document having anything to do with an ESOP or the Settlor's business affairs. The Fourth Circuit correctly declined to adopt

Petitioner's interpretation, instead following this Court's lead in *Curtiss-Wright Corp. v. Schoonejongen*, by interpreting the statute according to its plain meaning. The decision below is not in direct conflict with any other circuit court, and review by this Court is unwarranted.

A. There Is No Clear Conflict Among The Circuits On The Interpretation Of ERISA Section 104(b)(4) Or 404(a)(1)(A).

Petitioners attempt to create a conflict between the decision below and *Hughes Salaried Retirees Action Committee v. Administrator of the Hughes Non-Bargaining Retirement Plan*, 72 F.3d 686 (9th Cir. 1995), cert. denied, 116 S.Ct. 1676(1996) and *Bartling v. Fruehauf Corp.*, 29 F.3d 1062 (6th Cir. 1994). However, there is no clear and well defined conflict between these cases. Neither *Hughes* or *Bartling* presents the same or even analogous facts as those involved in the instant case, and the dicta discussion of the Sixth and Ninth Circuits on the scope of ERISA Section 104(b)(4) is too attenuated to warrant certiorari review. No other circuit has ruled on whether ERISA Section 404(a), 29 U.S.C. § 1104(a)(1)(A)[3], enlarges the

---

[3]Section 404(a)(1)(A) provides, in pertinent part, as follows:

> Subject to [exclusions not applicable here] a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits of participants; and beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan.

scope of Section 104(b)(4), and therefore that aspect of the Question Presented is also not ripe for review.

1. *Bartling* and *Hughes* Are Factually Distinguishable From This Case.

There is no direct conflict between *Bartling*, *Hughes* and the decision below on the scope of Section 104(b)(4) because the participants in *Bartling* and *Hughes* did not seek the type of documents at issue here. Subsequent decisions may well reveal that there is no substantial conflict between the circuits. Review at this point would be premature.

The *Bartling* court did not decide whether annual stock appraisal reports prepared for an ESOP which holds stock in a closely held corporation must be disclosed under Section 104(b)(4). The plan at issue there was not an ESOP, but was a defined benefit plan. The participants in *Bartling* sought the actuarial report required by ERISA Section 103(d), 29 U.S.C. § 1023(d). Section 103 requires every plan to prepare a comprehensive analysis known as the "Annual Report". The Annual Report for a defined benefit plan must contain a "complete actuarial statement" which includes current value of plan assets, present value of nonforfeitable benefits for participants, the actuarial assumptions used for that present value analysis; and certification of contributions needed to reduce any accumulated funding deficiency. 29 U.S.C. § 1023(d). The *Bartling* court found that because Section 103 of ERISA specifically required this report[4], it was a

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[4]The "valuation report" sought by petitioners in this case is not part of the actuarial report described in Section 103(d). ESOPs are

(continued...)

document "under which the plan was . . . operated within the meaning of 104(b)(4)". 29 F.3d at 1070.

Bartling did not directly address or indirectly comment on whether Section 104(b)(4) encompasses the documents at issue here. The Sixth Circuit provided little discussion of its rationale, but the reasoning expressed would not require a plan administrator to produce the documents Petitioners seek. Unlike the actuarial report, which ERISA expressly requires as part of the Annual Report, a tax qualification letter, the bonding policy, the valuation analysis of closely held stock which is an ESOP asset, or the corporate financial data used by the appraiser are not mentioned in ERISA Section 103, and need not be included as part of the Annual Report.

Similarly, *Hughes* does not involve participant requests for the documents at issue here, and thus does not present a square conflict. In *Hughes*, the participants sought a list of the names and addresses of all retired participants. Not only is the case factually dissimilar, but the Ninth Circuit's holding on the scope of Section 104(b)(4) is not necessarily inconsistent with that of the court below. In reversing the panel opinion, the en banc *Hughes* court held only that the "other instruments clause" of Section 104(b)(4) "is limited to documents that are similar in nature to the documents specifically listed in § 104(b)(4)." 72 F.3d at 691. There is not enough similarity between a list of retired participants and the documents at issue here to reliably predict how the Ninth Circuit would rule on the facts of this case.

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[4](...continued)
individual account plans, which are excluded from Section 103(d). Unlike the actuarial report in *Bartling*, the stock valuation analysis at issue here is not part of the Annual Report.

It is sheer speculation to forecast that the Ninth or Sixth Circuit might interpret Section 104(b)(4) more broadly than the Fourth Circuit did in the case below. Certiorari should not be founded on speculation or dicta, but on clear and unavoidable conflicts.

2. No Other Circuit Has Ruled On The Section 404(a)(1)(A) Aspect of the Question Presented

There is unequivocally no conflict among the circuits on the second aspect of the question Petitioners present for review: whether the general fiduciary duty provision of ERISA Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) enlarges the scope of Section 104(b)(4) and requires disclosure of the documents. The decision below held that the general duty provisions in Section 404 did not add to the particularized language of Section 104(b)(4), which specifically addresses documents to be furnished to participants. *Bartling* did not discuss Section 404(a)(1)(A) at all. The *Hughes* Court expressly declined to rule on whether Section 404(a)(1)(A) enlarges the disclosure obligations of Section 104(b)(4). Consequently, the only circuit opinion discussing this issue is the Fourth Circuit's opinion in this case. As discussed below, that decision correctly interpreted ERISA in accordance with principles enunciated by this Court, and should not be disturbed.

B. The Fourth Circuit's Decision Is Correct And Consistent With This Court's Discussion Of ERISA Disclosure Provisions.

Review is also not needed because the Fourth Circuit applied correct statutory interpretation principles and its decision is wholly consistent with this Court's

interpretation of ERISA. In *Curtiss-Wright Corp. v. Schoonejongen*,115 S.Ct. 1223, 1229-30(1995), this Court said that Section 104(b)(4) required production of "governing plan documents". The Fourth Circuit followed this Court's teachings about statutory interpretation in both method and result. In *Curtiss-Wright Corp.*, the Court looked at the plain words of another section of ERISA, found them clear, and rejected attempts to add a "gloss" extrapolated from legislative history or to redefine the clear text by supplementing it with some other section of the statute. The decision below correctly applies these principles.

Petitioners' argument about participants' "right" to minutely inspect plan activities is nothing more than their own extrapolation of legislative history. The Fourth Circuit correctly rejected arguments based on asserted legislative purpose because the text of Section 104(b)(4) is clear. As this Court did when analyzing the term "procedure" in *Curtiss-Wright Corp.*, the Fourth Circuit looked to the ordinary meaning of the word "instrument." Finally, the court below rejected Petitioners' argument that Section 404(a)(1)(A) somehow expands fiduciaries' duty to produce documents not otherwise within the scope of Section 104(b)(4). It correctly declined to supplement the "informational scheme" Congress created with "a far away provision in another part of the statute." *Faircloth v. The Lundy Packing Company*, 91 F.3d at 657, quoting *Curtiss-Wright Corp.*, 115 S. Ct. 1223, 1231 (1995).

The Fourth Circuit's interpretation of the "other instruments" clause of Section 104(b)(4) is a workable definition consistent with the plain language of the statute. Requiring the documents which must be furnished at risk of penalties to be those "formal or legal documents under which the plan is set up or managed" fully and fairly

implements the disclosure scheme carefully laid out in ERISA. Certiorari is not needed to review this decision.

C. The Plan Documents Itemized In Section 104(b)(4) Give Participants Sufficient Information To Scrutinize The ESOP.

Petitioners evoke the spectre of dishonest ESOP administrators manipulating plan assets as justification for the broad disclosure standard they advocate. However, there is no factual support for this scenario, and the picture Petitioners paint is created of nothing more than speculation. No claim of improper dealings with ESOP stock was made in the case below. The record clearly establishes that no sales or purchases of stock have been made by the ESOP with Lundy or any other party-in-interest in many years. Moreover, this argument is a disingenuous distortion of the precisely detailed structure of ERISA's information disclosure scheme. The documents specifically identified in Section 104(b)(4) provide information which ensures that participants can check on the safety of their retirement benefits.

Petitioners were given a copy of the Plan and Trust document, which describes virtually every aspect of the ESOP's administration. Petitioners were given the Summary Plan Description, which contains a section describing the participants' rights under ERISA. Petitioners were also given copies of the ESOP's Annual Report, which includes the ESOP's audited financial statements, for the three years preceding their request. As required by ERISA Section 103(a) through (c), 29 U.S.C. § 1023(a)-(c), the Annual Report contained extensive and detailed information about the ESOP, and was signed "under penalties of perjury and other penalties." These documents, especially the Annual

Report, provide Petitioners with enough information to "police" the plan.

The Annual Report contains detailed information about the ESOP's financial status, including an itemized list of assets held by the ESOP for investment purposes, with the cost and market value of each asset. It describes the ESOP's assets and liabilities at the beginning and end of the relevant year and sets forth in detail the ESOP's income and expenses. The Accountant's Report on the Financial Statements also reviews assets, income and expenses of the ESOP, and confirms that the fair market value of Lundy stock is determined by an independent appraiser.

The Annual Report requires answers to a series of detailed questions about transactions with parties-in-interest, thus alerting participants if transactions with a risk of potential harm to the ESOP have occurred. Any sales by the ESOP to the employer, or purchases of stock from the employer, must be disclosed in the Annual Report. The Annual Report specifically requires disclosure of any unlawful transactions with parties-in-interest.

The Annual Report requires confirmation that an independent accountant has been retained to review the financial statements of the ESOP. Lundy specifically certified in the 1992 Annual Report that the accountant's report "including the financial statements and/or notes required to be attached" did not disclose:

(1) any errors or irregularities;

(2) illegal acts;

> (3) material internal control weaknesses;
>
> (4) a loss contingency indicating that assets are impaired or a liability incurred;
>
> (5) significant real estate or other transactions in which the plan and (A) the sponsor, (B) the plan administrator, (C) the employer(s), or (D) the employer organization(s) are jointly involved;
>
> (6) that the plan has participated in any related party transactions; or
>
> (7) any unusual or infrequent events or transactions occurring subsequent to the plan year end that might significantly affect the usefulness of the financial statements in assessing the plan's present or future ability to pay benefits.

All of this information, which Section 104(b)(4) ensures that participants receive on request, provides security against unlawful misuse or manipulation of plan assets. ERISA also contains specific prohibitions against such misuse and manipulation, and provides specific remedies if participants believe that a breach of fiduciary duty or prohibited transaction or improper calculation of their benefits has occurred. Yet Petitioners want to transform Section 104(b)(4) into an obligation to disclose virtually every document reflecting or affecting an ESOP sponsor's finances, operations and business plans.

Petitioners' argument is illogical. The stock valuation report would do nothing to help participants determine whether stock has been sold too cheaply (or bought too expensively) by the ESOP. The Annual Report, which is specifically listed in Section 104(b)(4), is

the document which discloses the price at which assets are bought and sold by the ESOP. In fact, Petitioner's emphasis on the stock valuation report is not matched in ERISA. ERISA does not describe any particular method for ESOP stock valuation, and does not mention stock valuation reports at all.[5]

Petitioners' claim that they need the bonding policy and tax qualification letter is also rebutted by the Annual Report. The Annual Report confirms that the ESOP is covered by a bond, and states the amount, and name of the surety company. Similarly, it states the date of the last IRS determination letter and that the ESOP qualifies under the Internal Revenue Code. The independent accountant also certifies in the financial statements for the ESOP that it qualifies under the Internal Revenue Code and is exempt from federal income taxes. There is no compelling reason to burden plan administrators with a requirement to furnish the bonding policy or tax qualification letter when the facts concerning these documents and their existence are spelled out in the Annual Report, and confirmed by the independent auditors.

ERISA Section 104(b)(4) does not require fiduciaries to provide documentation of their exercise of prudence and absence of malfeasance in every aspect of plan administration. For example, if Congress intended the plan administrator to provide documents concerning the value of non-public ESOP stock to all participants, it

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[5]Section 401(a)(28)(C) of the Internal Revenue Code, 26 U.S.C. § 401(a)(28)(C), requires valuations of employer securities which are not readily tradable to be done "by an independent appraiser."

could have included the term "appraisal" in Section 104(b)(4)'s list of designated documents. It did not, but instead required the provision of the Annual Report, which contains the pertinent information about the stock.

Petitioners' desire for a microscopic "audit" of the ESOP and the settlor's financial records goes far beyond the elaborate informational scheme already in place. Allowing the detailed review of corporate and plan documents which plaintiffs seek would create a heavy administrative burden on ESOPs and their corporate sponsors and permit indiscriminate dissemination of otherwise private business information. Such a drastic course of action should not be "read into" the statute by distorting the plain language, but should occur, if at all, through Congressional action.

III. Conclusion

For all of the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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